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Supreme Court, U.S.
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No. _____

IN THE SUPREME COURT
OF THE UNITED STATES

GORDON JOHNSTON,
Petitioner,

v.

TAMPA SPORTS AUTHORITY, and HENRY G. SAAVEDRA, in his Official Capacity as Executive Director of the Tampa Sports Authority,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Fourth Amendment to the United States Constitution provides that:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. Amend. IV. Similarly, Article I, Section 12 of the Florida Constitution provides that:

> The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, . . . shall not be violated. No warrant shall be issued except upon probable cause, supported by affidavit, particularly describing the place or places to be searched, the person or persons, thing or things to be seized, the communication to be intercepted, and the nature of evidence to be obtained. This right shall be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court. . . .

Fla. Const. Art. 1 § 12.

The questions presented to this Court are:

1) Whether past consent to an unconstitutional search bars an individual's right to object to unconstitutional searches in the future?

2) Whether a government can condition entry into an event at a publicly-owned and operated stadium upon consent to a suspicionless pat-down search?

PARTIES TO THE PROCEEDING

Gordon Johnston ("Mr. Johnston"), Tampa Sports Authority, and Henry Saavedra, in his official capacity as Executive Director of the Tampa Sports Authority (Tampa Sports Authority and Henry Saavedra are collectively referred to herein as "TSA"), are the parties to this proceeding.

CORPORATE DISCLOSURE STATEMENT

The Petitioner, Gordon Johnston, is an individual and has no corporate affiliations.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Gordon Johnston, respectfully petitions for a writ of certiorari to review the June 18, 2008 Opinion of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The Opinions of the Eleventh Circuit are as follows:

1. June 26, 2007 Opinion from the Eleventh Circuit, which is reported at 490 F.3d 820 (11th Cir. 2007). (A-21).[1]

2. June 18, 2008 Order on Petition for Rehearing and Opinion Vacating June 27, 2007 Order, which is reported at 530 F.3d 1320 (11th Cir. 2008). (A-3).

3. August 20, 2008 Order Denying Petition for Rehearing En Banc, which is reported at 285 Fed. Appx. 745 (11th Cir. 2008). (A-1).

4. The Order of the United States District Court for the Middle District of Florida is reported at 442 F. Supp. 2d 1257 (M.D. Fla. 2006). (A-31).

[1] Record citations to the Appendix are referenced by "A-__" and the appendix number pursuant to Supreme Court Rule 14.

5. The Order of the Florida State Court Thirteenth Judicial Circuit in and for Hillsborough County is unreported. (A-67).

JURISDICTION

The Eleventh Circuit's Opinion from which review is sought was entered on June 18, 2008. (A-3). The Eleventh Circuit's Order denying the Petitioner's Petition for Rehearing En Banc was entered August 20, 2008. (A-1). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Supreme Court Rule 10(a) because the Eleventh Circuit's Opinion conflicts with decisions of the First Circuit Court of Appeals and the state courts of last resort in Florida, Hawaii, Iowa, and North Dakota on important United States Constitutional questions, and decides an important United States Constitutional law question that either is contrary to decisions of this Court or has not been, but should be, settled by this Court.

CONSTITUTION AND STATUTORY PROVISIONS INVOLVED

Relevant portions of the Fourth Amendment to the United States Constitution; Title 42, United States Code, Section 1983; and Article I, Section 12 of the Florida Constitution are set forth at A-78, A-79, A-80.

STATEMENT OF THE CASE

Introduction

The Supreme Court should accept certiorari review of this case because the Eleventh Circuit's June 18, 2008 Opinion (the "Opinion") is contrary to established law in this Court, the Eleventh Circuit, in Florida, and elsewhere. The Opinion's reasoning is flawed under this Court's precedent as to the scope of consent to unreasonable searches under the Fourth Amendment, and it creates an unprecedented new exception to the Fourth Amendment that requires review by this Court.

Contrary to well-established precedent, the Eleventh Circuit held that Mr. Johnston's alleged past consent to the unconstitutional searches waives his right to seek injunctive relief to prevent an unconstitutional future search. The Opinion further ignored well-established Florida precedent in *State v. Iaccarino*, 767 So. 2d 470 (Fla. Dist. Ct. App. 2d 2000), that an individual does not consent to a search merely by "submission" to the search as a condition of attending an event. The Eleventh Circuit further ignores other state courts of last resort on the issue of consent.

Next, the Eleventh Circuit held, without citing to any authority or other support, that a private entity, in this case, the National Football League (the "NFL") or one its franchisees, the Tampa Bay Buccaneers (the "Buccaneers"), can immunize a state actor from Fourth Amendment scrutiny by requesting that the state actor require that an individual surrender his or her right to be free from

unconstitutional warrantless searches as a condition to entering government-owned property. This has never been the law. The Opinion has far-reaching consequences that should be reviewed by this Court.

Finally, the Eleventh Circuit refused to apply its own important decision in *Bourgeois v. Peters*, 387 F.3d 1303 (11th Cir. 2004), which holds that suspicionless pat-down searches are unconstitutional and that the government, whether acting alone or in concert with a private party, cannot condition access on the waiver of a constitutional right.

Course of Proceedings

On October 13, 2005, Mr. Johnston filed a state court lawsuit in the Thirteenth Judicial Circuit in and for Hillsborough County, Florida (the "Florida State Court"), challenging mass, suspicionless above-the-waist pat-down searches of all patrons that entered Raymond James Stadium ("RJS") for the Tampa Bay Buccaneers' ("Buccaneers") football games. Mr. Johnston alleged that the suspicionless pat-down searches violated his rights under the Florida Constitution. He sought nominal damages and injunctive relief to stop TSA from conducting the pat-down searches in the future.

Following evidentiary hearings on October 29, 2005 and October 27, 2005, the Florida State Court orally ruled that the mass, suspicionless pat-downs were unconstitutional and enjoined TSA from conducting them. On November 2, 2005, the Florida State Court entered its written order, finding that: (1) TSA was a state actor when performing the searches; (2) Mr. Johnston had not consented to

being searched; (3) no "special needs" supported TSA's use of suspicionless, mass pat-down searches; and (4) the equities and public interest favoured an injunction. (A-1).

After the Florida State Court denied Mr. Johnston's motion to vacate the automatic stay of the injunction, imposed pursuant to Florida Rule of Appellate Procedure 9.310(b)(2) when a governmental entity appeals an adverse ruling, Mr. Johnston filed an emergency motion to lift the stay with the Florida Second District Court of Appeal. The Florida Second District Court of Appeal lifted that stay, rendering the injunction effective. *Tampa Sports Auth. v. Johnston,* 914 So. 2d 1076 (Fla. Dist. Ct. App. 2d 2005).

Mr. Johnston amended his Complaint to add claims for violations of the Fourth Amendment of the Constitution of the United States and 42 U.S.C. § 1983. On November 4, 2005, TSA removed the case to the United States District Court for the Middle District of Florida (the "District Court") and moved for reconsideration of the preliminary injunction on December 12, 2005. After oral argument, the District Court denied TSA's motion for reconsideration. (A-31).

TSA appealed the District's Court's order to the United States Court of Appeals for the Eleventh Circuit (the "Eleventh Circuit"). On June 26, 2007, the Eleventh Circuit reversed the District Court's Order, ruling that Mr. Johnston had consented to the searches. (A-3). Mr. Johnston filed a Petition for Rehearing, which the Eleventh Circuit granted on June 18, 2008. (A-31). The Court vacated its June

26, 2007 Opinion, but still reversed the District Court's Order. (*Id.*). Although the Opinion reached the same result, the Eleventh Circuit Panel substituted a more far-reaching opinion on state action and consent that warrants review by this Court. (*Id.*). Mr. Johnston filed a Petition for Rehearing En Banc of the June 18, 2008 Opinion, which the Eleventh Circuit denied on August 20, 2008. (A-1).

Mr. Johnston then filed a Motion to Stay Issuance of the Mandate pending a certiorari petition to the Supreme Court of the United States. Judge Birch, who was part of the three judges Panel who authored the per curiam opinions in this case, granted the motion and stayed issuance of the Mandate. TSA filed a Motion for Reconsideration and requested that the three-judge merits panel reconsider the order, vacate the stay, and direct issuance of the mandate. The Panel granted TSA's Motion for Reconsideration on September 22, 2008. On September 25, 2008, after the Mandate was issued, the District Court dissolved the injunction.

STATEMENT OF FACTS

Mr. Johnston is a public high-school United States history and government teacher, as well as an ordained Baptist minister. Since 2001, Mr. Johnston has held two (2) season tickets to Buccaneers games. To become a season ticket holder, Mr. Johnston paid a seat deposit equal to one year's season ticket price. The deposit is returned five (5) percent a year for nine (9) years, with 55% returned in 2011. If Mr. Johnston ceases to be a season ticket holder at any

time before 2011, he loses the rest of his seat deposit.[2]

In February 2005, Mr. Johnston renewed his season tickets for the 2005-06 season at a cost of $869.20 per ticket, and he paid $250 for a season-long parking pass. When Mr. Johnston received his season tickets for the 2005 season in approximately August 2005, a few weeks before the first pre-season game, he also received a 2005 season ticket handbook. Neither the renewal information nor the tickets informed Mr. Johnston that he would be subject to pat-down searches before entering RJS to attend Buccaneer games.

TSA's Status As A State Actor

TSA, a public entity created by the Florida legislature, operates RJS for a public purpose. *Poe v. Hillsborough County*, 695 So. 2d 672, 677 (Fla. 1997); *Volume Servs. Division of Interstate Corp. v. Canteen Corp.*, 369 So. 2d 391, 395 (Fla. Dist. Ct. App. 1979); Fla. R. App. P. 9.310(b)(2).

The Buccaneers, a NFL franchise, plays its home football games at RJS pursuant to a Stadium Agreement between the Buccaneers and TSA. TSA is responsible for security during Buccaneers games,

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[2] As a season ticket holder, Mr. Johnston may renew his season tickets. However, at the time the pat-down searches began, there was a 100,000 plus waiting list for season tickets, and, thus, if Mr. Johnston gave up his season tickets, it could have been a long time before he was eligible to purchase season tickets in the future.

and taxpayer dollars are used to pay the security costs. The searches at issue were are conducted by security personnel hired, trained, and managed by TSA. The searches were performed under the supervision of law enforcement officers. TSA's agreement for use of RJS is with the Buccaneers, not the NFL. The NFL does not have any contractual agreements with TSA related to the Buccaneers' home games at RJS.

TSA's Decision To Implement Pat-Down Searches

In August 2005, the NFL requested that all persons attending NFL games be patted down from the waist up. The objective of the pat-down search was an attempt "to exclude large improvised devices, or large weapons," such as an "improvised explosive device" ("IED"). On August 24, 2005, the Buccaneers sent a memo to TSA informing it that the NFL mandated suspicionless pat-downs searches of every patron attending a NFL game and demanding that TSA implement the pat-down searches for the Buccaneers games. Before the NFL's request, TSA took numerous steps to protect fans entering RJS. Uniformed police officers monitored fans entering the stadium. The officers were available as back-up if problems surfaced at the entry gates. TSA also used bomb-sniffing dogs to patrol the stadium and its surroundings and inspected under the hats and inside the purses of fans entering RJS.

Shortly after 9/11, TSA considered implementing pat-down searches, but determined that the pat-down searches were not necessary. The issue of pat-down searches came up a second time, but TSA again voted against them, deciding that the

steps TSA already had in place were sufficient and an effective means to protect fans from an attack. At no time, either before or after TSA finally voted to implement the NFL's pat-down policy, were there any particularized threats to the Buccaneers, any NFL teams, or any NFL games.[3]

On September 13, 2005, after Mr. Johnston paid fully for his 2005-06 season tickets, TSA held a special meeting to consider whether to require pat-down searches of all persons attending NFL games at RJS.[4] At that meeting, TSA's lawyer opined that the pat-down searches would be unlawful unless the objecting season ticket holders were offered refunds of their tickets. When TSA board members asked if any facts warranted a different security analysis than in other post-2001 years, when no pat-down searches were deemed necessary, no such facts were presented other than comments to the effect of "[a]ll

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[3] Approximately two (2) years before the beginning of this suit, TSA did receive a bomb threat, which turned out to be a false alarm. TSA did not find it necessary to institute pat-down searches during the entire two (2) years after receiving the threat.

[4] In addition to hosting the Buccaneers, RJS hosts the University of South Florida's ("USF") football games. No pat-down searches have ever been conducted of persons attending the USF games.

the other stadiums are doing it, and you don't want to be the only one."[5]

At the September 13, 2005 meeting, TSA also discussed the additional cost to the taxpayers due to the pat-down search policy. That cost was estimated at over $9,500.00 per game. When TSA made the decision to implement the pat-down search policy, the Buccaneers and the NFL refused to pay for the additional expenses, leaving taxpayers to foot the bill. Ultimately, TSA voted to implement the pat-down searches at all Buccaneer games at RJS.

Mr. Johnston Refused to Consent to the Pat-Down Search

When Mr. Johnston learned that TSA intended to conduct pat-down searches, he contacted the Buccaneers to object, at which time he was told that the Buccaneers would not refund the cost of season tickets to ticket holders who objected to the pat-down searches. Mr. Johnston was not willing to consent to the pat-down searches as a condition of retaining his season tickets, nor was he willing to give up his season tickets, which would entail not

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[5] In fact, contrary to the misrepresentations of the NFL representative addressing the board, neither the Cincinnati stadium nor Soldier Field in Chicago were conducting pat-down searches at the time of the meeting. Neither city conducted pat-down searches until its respective NFL team agreed to pay for the searches, at least temporarily, and, in the case of Chicago, to indemnify the governmental agency against claims in connection with the pat-down searches. The Chicago Park District filed a lawsuit asking a federal judge to declare the pat-down policy unconstitutional; the district court dismissed the action on standing grounds. 2006 WL 2331099 (N.D. Ill. 2006).

only losing the cost of season tickets and the remainder of his seat deposit, but also losing his right to renew season tickets and his right to enjoy the Buccaneers games for the remainder of the 2005-06 season.

When Mr. Johnston went to the first regular season home game of 2005, he lifted up his shirt to demonstrate that he had nothing strapped to his body and stated that he did not consent to the search, but he was searched nonetheless. At the second and third home games of 2005, he again stated that he did not consent to being searched, but he was searched anyway. Mr. Johnston did not see any signs warning him that he would be subject to a pat-down search until the third home game of 2005. After the third home game, the Florida State Court enjoined TSA from conducting the suspicionless, warrantless pat-down searches.

The Pat-Down Searches are Observed by Law Enforcement Officers

Not only did TSA implement the pat-down searches, but also it required that a law enforcement officer be present at each of the gates to support the private security. Indeed, pursuant to its mandate, the NFL required that uniform police officers be at the gates and in plain view of the individuals conducting the pat-down searches. The security personnel performing the pat-down search were required to notify law enforcement officers if they found contraband. In all areas where patrons were admitted into the stadium, there were law enforcement officers and other uniformed security people.

The security director for the Tampa Bay Buccaneers, Andres Trescastro ("Mr. Trescastro"), informed the TSA board that, if law enforcement officers had plain view to contraband, they were going to arrest the patron, because neither the NFL nor the Buccaneers could make that decision. Indeed, law enforcement officers were prepared to do more than just observe the pat-down searches. Robert Hast ("Mr. Hast"), the NFL's Director of Event Security, testified that "[w]e requested that stadiums place a law-enforcement officer at each of the gates to support the private security because they don't have authority to make arrests." According to Mr. Hast, the screeners were trained to call law enforcement officers over to detain or arrest any individual found to have contraband. Similarly, Mickey Farrell ("Mr. Farrell"), TSA's Director of Operations, testified that police officers were strategically positioned near the screeners and had discretion to conduct "extended searches," if necessary.

REASONS FOR GRANTING THE PETITION

The Supreme Court should accept certiorari review because the Eleventh Circuit's Opinion conflicts with decisions from the First Circuit Court of Appeals, the Eleventh Circuit's own precedent, and numerous state courts of last resort, including Florida, on the issue of consent. Further, the Opinion involves an important question of United States Constitutional law, namely whether a private party can force the government to require individuals to waive their rights to be free from

unconstitutional searches as a condition to entry into government-owned property.

Supreme Court Rule 10, which governs this Court's discretion in granting a petition for certiorari, provides that:

> The following, although neither controlling nor fully measuring the Court's discretion [in granting a petition for certiorari], indicate the character of the reasons the Court considers:
>
> (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;
>
> . . . .
>
> (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way

that conflicts with relevant decisions of this Court.

Sup. Ct. Rule 10(a) and (c).

A. The Eleventh Circuit Opinion Conflicts With Decisions of Other Circuit Courts of Appeal and State Courts of Last Resort.

The Eleventh Circuit ruled that Mr. Johnston was not entitled to injunctive relief because he consented to the searches by passing through the entry gates and attending three (3) games, even though he orally protested the searches every time. The Eleventh Circuit's Opinion can be read to mean only one of two propositions, both of which are contrary to law: (1) past consent forever bars future objection to an unconstitutional search; or (2) Mr. Johnston could be required to submit to future unconstitutional searches as a condition of entry into a publicly-owned and operated stadium.

The Eleventh Circuit's first "conclusion" conflicts with the First Circuit Court of Appeals in *Blackburn v. Snow*, 771 F.2d 556 (1st Cir. 1985), in which the First Circuit held that past consent to a strip search did not waive an individual's right to challenge the constitutionality of future searches; and *Cochrane v. Quattrocchi*, 949 F.2d 11 (1st Cir. 1991), in which the First Circuit held that consent to a strip search given by a prison visitor was not legally cognizable when the visitor was confronted with the "constitutionally intolerable" choice between being denied prison visitation access or waiving her right to be free from unreasonable searches.

The Eleventh Circuit's Opinion also conflicts with the its own decision in *Bourgeois v. Peters*, 387 F.3d 1303 (11th Cir. 2004), in which the court rejected the implied consent doctrine where the city argued that the plaintiffs consented to the search because they chose to participate in a protest.[6]

If, on the other hand, the Eleventh Circuit's Opinion is read to mean that Mr. Johnston could be compelled to submit to governmental pat-down searches as a condition of entering RJS, the Opinion conflicts with controlling Florida case law, as well as almost every other court decision examining pat-down searches at public arenas, all of which have found Fourth Amendment violations.

First, the Eleventh Circuit's Opinion directly conflicts with *State v. Iaccarino*, 767 So. 2d 470 (Fla. Dist. App. Ct. 2d 2000). This is a decision of a

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[6] The Eleventh Circuit's Opinion in *Johnston* also potentially conflicts with the Second Circuit Court of Appeals decision in *Cassidy v. Chertoff*, 471 F.3d 67 (2d Cir. 2006), which allowed the plaintiffs to bring a Fourth Amendment challenge even though they consented to searches as a condition of riding on a Lake Champlain ferry. *Chertoff*, 471 F.3d at 77 n. 3 (noting that the plaintiffs acquiesced in the searches and that "[o]ur opinion does not address the constitutionality of any repercussions that might be visited upon a person who withholds consent."). The Second Circuit ultimately ruled against the plaintiffs under the "special needs" doctrine.

Florida state court of last resort.[7] In *Iaccarino*, patrons entering a "Zenfest" concert were required to undergo pat-down searches. *Iaccarino*, 767 So. 2d at 473. During the planning of the Zenfest, the promoter, property owner, and the sheriff's officials met to discuss the purpose of the search – to prohibit drugs and bottles from being brought into the stadium. *Id.* The concert promoter also demanded that the sheriff's office be the lead security agency. *Id.* The court held the searches unconstitutional, rejecting the government's theory of implied consent.[8] *Id.* The *Iaccarino* court found no implied consent when the "failure to acquiesce in a search

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[7] In *Iaccarino*, the Eleventh Circuit noted, "[i]n evaluating Johnston's claim under the Florida Constitution, we are compelled to apply the facts of this case to Florida constitutional law as interpreted by the Florida Supreme Court, and, absent a contrary ruling by the Florida Supreme Court, Florida's intermediate appellate courts. *McMahan v. Toto*, 311 F.3d 1077, 1080 (11th Cir.2002), *cert. denied; Nemesis Veritas, L.P. v. Toto*, 539 U.S. 914, 123 S. Ct. 2273 (2003); *Pardo v. State*, 596 So.2d 665, 666 (Fla.1992) ('the decisions of the district courts of appeal represent the law of Florida unless and until they are overruled by this Court.') (internal quotation marks omitted)." *Johnston v. Tampa Sports Auth.*, 530 F.3d 1320, 1326 (11th Cir. 2008). Indeed, this Court has granted certiorari to review at least two (2) Florida District Courts of Appeals cases: *Howlett v. Rose*, 496 U.S. 356, 110 S. Ct. 2430 (1990) (reviewing Second District Court of Appeal opinion); and *Palmore v. Sidoti*, 466 U.S. 429, 104 S. Ct. 1879 (1974) (same).

[8] The Florida Second District Court of Appeal set forth the requirements for implied consent: (1) "whether the defendant was aware that his conduct would subject him to a search;" (2) whether a "vital interest" supports the search; (3) the apparent authority of the officer to conduct the search; (4) "whether the defendant was advised of his right to refuse;" and (5) "whether refusal would result in a deprivation of a benefit or right." *Iaccarino* at 475 (citations omitted).

would result in a deprivation of a patron's right to attend the concert, if not their ticket cost as well." *Id.*

The Eleventh Circuit failed to recognize the important fact that the Buccaneers refused to offer Mr. Johnston a refund. By refusing to be searched, Mr. Johnston would lose not only the enjoyment of the games, but also the value of his season tickets and the remainder of his multi-year seat deposit.[9] Indeed, at the meeting where TSA considered the pat-down searches, TSA's own lawyer advised that the searches would be unconstitutional absent a refund. Under *Iaccarino*, Mr. Johnston's conduct did not constitute implied consent because his consent was not voluntarily given; nor was it free from constraint.[10]

The Eleventh Circuit's Opinion also conflicts with decisions from state courts of last resort in:

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[9] The Eleventh Circuit also misapplied the facts and law as to the nature of Mr. Johnston's contractual rights as a ticket holder. While the Buccaneers did have the right to deny Mr. Johnston entry, the terms of the ticket agreement conditioned that right upon giving Mr. Johnston a refund. Because the Buccaneers refused to grant a refund, it did not have the right to eject him unless he was unruly. Florida law on the rights of ticket holders, which controls Mr. Johnston's contractual rights, is clear that a ticket holder cannot be barred from an event merely for refusing to consent to a governmental search. *Iaccarino*, 767 So. 2d 470.

[10] "Searches conducted by means of consent are valid so long as the consent is voluntary." *U.S. v. Chrispin*, 181 Fed. Appx. 935, 2006 WL 1457689, at *3 (11th Cir. 2006) (citations omitted); *see Shapiro v. Fla.*, 390 So. 2d 344, 348 (Fla. 1980) ("[C]onsent must be free and unconstrained, and the question of voluntariness is a question of fact to be determined from the totality of the circumstances").

- North Dakota: *North Dakota v. Seglen*, 700 N.W.2d 702 (N.D. 2005) (ruling that a pat-down search at hockey arena violated the Fourth Amendment);
- Hawaii, *Nakamoto v. Fasi*, 635 P.2d 946 (Hawaii 1981) (holding that searches by private security guards that were hired by rock concert promoter at city-owned auditorium violated Constitution when conducted pursuant to city policy); and
- Iowa, *State v. Carter*, 267 N.W.2d 385 (Iowa 1978) (holding random search of rock patron unconstitutional because it was conducted without consent or probable cause).[11]

The Eleventh Circuit bypassed the holdings of *Iaccarino* and these other state courts of last resort by discussing the doctrine of unconstitutional conditions. To rule against Mr. Johnston, the Eleventh Circuit had to distinguish its earlier case of *Bourgeois v. Peters*, 387 F.3d 1303 (11th Cir. 2004), which ruled that protesters could not be required to consent to suspicionless searches as a condition of entering property near a military base. The government, in *Bourgeois*, argued that the searches (which were less intrusive than the pat-down searches here) did not violate the Fourth

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[11] *See also Stroeber v. Comm. Veteran's Auditorium*, 453 F. Supp. 926, 931 (S.D. Iowa 1977) (finding warrantless, suspicionless searches at rock concert violated the Fourth Amendment); and *Gaioni v. Fulmar*, 460 F. Supp. 10 (M.D. Ala. 1978) (finding random, warrantless searches of patrons attending rock concerns at municipally-owned civic center unconstitutional).

Amendment because, "post-September 11, 2001, th[e] Court can determine [that] the preventive measure of a magnetometer at a large gathering is constitutional as a matter of law." *Id.* at 1311. The *Bourgeois* court disagreed:

> This argument is troubling. While the threat of terrorism is omnipresent, *we cannot use it as a basis for restricting the scope of the Fourth Amendment's protections in any large gathering of people.* In the absence of some reason to believe that international terrorists would target or infiltrate this protest, there is no basis for using September 11 as an excuse for searching protestors.

Id. (emphasis added). The court held that the government had not established probable cause because there was no evidence that anyone targeted this event for a terrorist attack, nor were there any exigent circumstances present that would necessitate an immediate warrantless search. *Id.* at 1311, 1316. The court further held that the fact that the protestors could choose not to participate did not alleviate the constitutional infirmity of the searches. *Id.* at 1324. "The very purpose of the unconstitutional conditions doctrine is to prevent the Government from 'subtly pressuring citizens, whether purposefully or inadvertently, into surrendering their rights.'" *Id.* at 1324-1325.

The Eleventh Circuit attempted to sidestep this precedent by creating a new rule – that the doctrine of unconstitutional conditions does not

apply when the government's actions are instigated at the request of a private party. Specifically, the Eleventh Circuit stated that:

> [T]he government had no role in formulating or mandating the pat-down policy. The policy exists solely because of the NFL's mandate. Because the condition for entry was imposed by a private party, Johnston was not forced by the government to choose between assertion of his constitutional rights and obtaining a benefit to which he was entitled. The NFL's condition does not invalidate Johnston's voluntary consent to the pat-downs. The unconstitutional conditions doctrine does not apply to these searches required by a private entity.

Johnston, 530 F.3d at 1329. The Eleventh Circuit's conclusion was not based on any authority or other support. The implications of the Opinion are extremely troubling, holding that the government can impose unconstitutional conditions with impunity if requested to do to by a private party.

Other courts have held similar searches unconstitutional even when requested by private parties. *E.g. Iaccarino*, 767 So. 2d 470 (Fla. Dist. App. Ct. 2d 2000) (holding consent invalid when ticket holder required to give up ticket value and loss of event experience, even if it was private concert promoter who requested the searches); *see also Pruitt v. Pernell*, 360 F. Supp. 2d 738 (E.D.N.C.

2005) ("When a government official affirmatively facilitates or encourages an unreasonable search performed by a private person, a constitutional violation occurs."); *Suss v. Amer. Soc. for the Prevention of Cruelty to Animals*, 823 F. Supp. 181 (S.D.N.Y. 1993) (finding that a private organization was a state actor where the organization required governmental assistance, relied upon contracts with the city to operate, and its services involved governmental functions).

Further, the record is replete with governmental coercion. Even though it was the NFL, not TSA, that originally found a need for the searches, the record is clear that the pat-down search policy was approved, implemented, and paid for by TSA. When Mr. Johnston first filed this lawsuit, the cost of the searches was paid for completely with public funds. TSA trained the searchers and implemented the pat-down searches, which were supervised by law enforcement officers. After the injunction was entered, the Buccaneers and TSA agreed to split the cost of the pat-down searches, but it is still taxpayer money paying for half of the cost of the searches, and it is only TSA, not the Buccaneers, that handles the pat-down searches.

B. The Opinion Decides an Important Question of Federal Law.

The Court also should accept certiorari review because the Opinion decides an important question of United States Constitutional law. Specifically, this case presents a loss of important constitutional rights based on either a claim of past consent or that

a private entity can immunize the government by requesting the government to engage in otherwise unconstitutional conduct.

TSA made no findings that pat-down searches were necessary to protect fans from IEDs at RJS. TSA determined, not once but twice, that the threat to Buccaneers' fans was not so great as to required pat-down searches. In fact, TSA used trained observers and bomb-sniffing dogs and decided, on its own, that these protections were sufficient. No law enforcement agency ever suggested the need for pat-down searches. It was only when the NFL, through TSA's tenant, the Buccaneers, requested the searches, that TSA approved them.[12] This Court has pointed out the importance of the Constitution in difficult times. *Boumediene v. Bush,* 128 S. Ct. 2229, 2277 (2008) ("The laws and Constitution are designed to survive, and remain in force, in extraordinary times. Liberty and security can be reconciled; and in our system they are reconciled within the framework of the law."); *Dist. of Columbia v. Heller,* 2008 WL 2520816 (2008) ("Constitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures or (yes) even future judges think that scope too broad."). The Eleventh Circuit's Opinion involves important

[12] Further, there is little factual support for the NFL's claims of danger. TSA's only support in the record was an Internet printout of a news story about the FBI discovering stadium plans (for the Midwest) downloaded on a laptop allegedly connected with people associated with terrorists. Furthermore, this alleged download occurred two (2) years before the NFL requested the pat-down searches. The only other fact on which TSA relied to establish danger is that Homeland Security has declared stadiums "no-fly" zones during NFL games.

Constitutional issues that affect not only an individual's right to be free from warrantless searches, but also the right of individuals to challenge the constitutionality of government conduct when that conduct is requested by a private party. Mr. Johnston respectfully requests that the Court grant his Petition for Writ of Certiorari.

CONCLUSION

The Eleventh Circuit's Opinion conflicts with other Circuit Courts and state courts of last resort on whether past consent to unconstitutional conduct waives a person's right to object to the same unconstitutional conduct in the future or whether a government may require suspicionless pat-down searches at the request of a private party as a condition of entry into a publicly-owned property. Further, the Eleventh Circuit Opinions involved important questions of United States Constitutional law. Mr. Johnston respectfully requests that the Court accept certiorari review of this matter.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

NO. 06-14666

GORDON JOHNSTON,

Plaintiff-Appellee,

versus

TAMPA SPORTS AUTHORITY,
HENRY G. SAAVEDRA,
in his official capacity as
Executive Director of the
Tampa Sports Authority,

Defendants-Appellants.

On Appeal from the United States District Court for the
Middle District of Florida

ON PETITION(S) FOR REHEARING AND
PETITION(S) FOR REHEARING EN BANC

Before: BIRCH and FAY, Circuit Court Judges, and DUFFEY, * District Judge.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

[August 20, 2008]

/s/ Stanley F. Birch,
Eleventh Circuit US Court of Appeals, Judge

ORD-42
(2/05)

*Honorable William S. Duffey, Jr., United States District Judge for the Northern District of Georgia, sitting by Designation

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 06-14666

D.C. Docket No. 05-02191-CV-T-27-MAP

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
JUNE 18, 2008
THOMAS K. KAHN
CLERK

GORDON JOHNSTON,

Plaintiff-Appellee,

versus

TAMPA SPORTS AUTHORITY and
HENRY G. SAAVEDRA, in his Official Capacity as Executive Director of the Tampa Sports Authority,

Defendants-Appellants.

Appeal from the United States District Court for the Middle District of Florida

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(June 18, 2008)

ON PETITION FOR REHEARING

Before BIRCH and FAY, Circuit Judges, and DUFFEY,* District Judge. PER CURIAM:

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* Honorable William S. Duffey, Jr., United States District Judge for the Northern District of Georgia, sitting by designation.

We have carefully reviewed the Appellee's timely petition for rehearing en banc requesting that we reconsider our previous Opinion dated June 26, 2007, published at 490 F.3d 820, reversing the judgment of the District Court and remanding the case. Upon reconsideration of that Opinion, we vacate our prior Opinion and substitute the following revised Opinion in its place.

The issue before the Court is whether the District Court erred when it refused to vacate a Florida state court's order enjoining Appellant Tampa Sports Authority's (the "Authority") policy of conducting pat-down searches of all ticket holders seeking to attend Tampa Bay Buccaneers (the "Buccaneers") games at the Raymond James Stadium in Tampa, Florida (the "Stadium"). We conclude that Appellee Gordon Johnston consented to the searches. The District Court thus erred in not reconsidering and vacating the preliminary injunction. Accordingly, we reverse and remand for further proceedings consistent with this Opinion.

I. BACKGROUND

In September 2005, the Authority instituted a policy requiring brief pat-down searches of all persons attending Buccaneers football games. Johnston is a Buccaneers season ticket subscriber who first became a season ticket holder in 2001. The season ticket is, on its face, a revocable license for entry to the Stadium to attend Buccaneers games.

Authority grants the Buccaneers, a franchise of the National Football League (the "NFL"), use of the Stadium pursuant to a Stadium Agreement (the "Agreement"). The Agreement provides that the Authority remains responsible for stadium security

during Buccaneers games, and obligates the Authority to "make proper rules and regulations for use of the Stadium with regard to all Stadium Events, provided, however, that the content of such rules and regulations shall be reasonably consistent with the rules and regulations enacted for other NFL stadia . . . ."

In February 2002, the NFL first implemented a policy requiring pat-down searches for Super Bowl XXVII and other special events. In August 2005, the NFL Commissioner expanded the policy to require pat-down searches of all patrons entering NFL stadiums. The NFL requires the pat-down policy to protect members of the public who attend NFL games. The NFL concluded that NFL stadiums are attractive terrorist targets based on the publicity that would be generated by an attack at an NFL game.[1] The pat-down search policy focuses on the detection of improvised explosive devices ("IED") which might be carried on a person entering a stadium. These pat-down searches currently are conducted at all NFL events except at the Stadium, where they have been enjoined.

On August 24, 2005, the Buccaneers informed the Authority of the NFL-mandated pat-down searches as a condition for admission to NFL events.

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[1] The NFL cites to the 2004 and 2005 suicide bombings in London and Madrid, threats made to other sporting events, including a soccer venue in Spain, and knowledge that individuals suspected to be tied to terrorist groups had downloaded information from the Internet about NFL stadiums in St. Louis and Indianapolis. Although the FBI later deemed the threats and the downloads not to present a threat to NFL stadiums, these events formed the context in which the NFL decided to request that a pat-down policy be enacted at all NFL games.

On September 13, 2005, the Authority, upon the urging of representatives from the NFL and the Buccaneers, approved a policy to conduct limited above-the-waist pat-down searches of all persons attending Buccaneers football games. The Authority does not require pat-down searches for patrons attending its other non-NFL events at the Stadium, including University of South Florida football games.

The pat-down searches are conducted by outside screeners hired by the Authority. The Authority and the Buccaneers share the expense of the screeners and the Authority oversees how the searches are conducted.[2]

Consistent with the policy urged by the NFL, the pat-down searches at the Stadium focus on the detection of IEDs. At each admission gate, screeners ask people entering the Stadium to hold their arms out to their side, palms up. Screeners inspect the individual for wires, detonators or other telltale signs of an IED. Screeners then run their hands lightly along the sides of the torso and downthe spine. If the individual's skin is exposed, screeners do not make contact with it. If the individual has large pockets, the screener may ask him to empty them for review of any items. Female inspectors conduct searches on females, and male inspectors inspect males. Anyone who refuses to be patted down is denied entry to the Stadium.

Johnston was aware of the pat-down policy before the first game of the 2005 season.[3]

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[2] If contraband is discovered during a search, a uniformed law enforcement officer is alerted and investigates.

[3] Before the 2005 season, bags, purses, and other containers carried by those attending games were searched. Johnston did not before and does not now object to these searches.

Press releases announcing the initiation of the pat-down policy were published in the media, on the Buccaneers' website and in a direct communication to season ticket holders. Stadium employees distributed notices about the pat-down policy to cars entering the Stadium parking lot before games. Announcements were made over loudspeakers outside of the Stadium before games, advising those who approached the Stadium that pat-downs would be conducted at the entrances. Multiple signs were placed along common walking routes, including those from parking areas to the Stadium, announcing the pat-down policy.

Johnston called the Buccaneers' office before the first game of the 2005 season to discuss the pat-down search policy. Johnston objected to the policy, and claims that he was told that the Buccaneers would not refund the cost of season tickets based solely on his objections. He stated later he would not have accepted a refund even if offered. Having been advised of the policy, Johnston nonetheless presented himself and his ticket at an entrance to the Stadium on three occasions. On each occasion, a screener advised Johnston that a pat-down search would be performed. Johnston verbally objected to the pat-down but allowed it to be conducted so that he could attend the games. After attending the second game, Johnston sued the Authority in state court seeking to enjoin the searches. Johnston attended a third game after filing suit, and, after offering his objection, he again submitted to a pat-down search. After the third game, the Florida state court enjoined the searches, and Johnston attended subsequent games without being subjected to the search.

II. PRIOR PROCEEDINGS

On October 13, 2005, Johnston filed suit against the Authority and Henry G. Saavedra[4] in the Circuit Court for the Thirteenth Judicial Circuit of Florida. Johnston challenged the constitutionality of the pat-down searches under the the searches. On November 2, 2005, the state court found the searches unconstitutional under the Florida Constitution and entered a preliminary injunction halting the searches.

The Authority appealed the ruling, and the preliminary injunction automatically was stayed under Florida Rule of Appellate Procedure 9.310(b)(2). Johnston moved the Thirteenth Judicial Circuit of Florida to vacate the automatic stay. His motion was denied. Johnston filed an emergency motion with the Florida Second District Court of Appeals to vacate the stay. On November 4, 2005, the Second District Court of Appeals granted Johnston's motion and vacated the stay, thus reinstating the preliminary injunction halting the searches.

On November 3, 2005, Johnston amended his complaint to add a claim pursuant to 42 U.S.C. § 1983 that the searches violated the Fourth Amendment to the United States Constitution. On November 30, 2005, the Authority removed the case to the United States District Court for the Middle District of Florida. On December 12, 2005, the

Authority moved the District Court to reconsider and vacate the injunction issued by the

[4] Johnston sued Defendant Saavedra in his official capacity as Executive Director of the Authority. Johnston's claims against Saavedra are indistinguishable from his claims against the Authority.

state court, pursuant to Fed. R. Civ. P. 59(e). The District Court denied the motion, finding that Johnston did not consent to the pat-down searches and that the searches violated the Florida Constitution and the

III. STANDARD OF REVIEW

After removal, orders issued by the state court are considered orders of the district court. Jackson v. Am. Sav. Mortgage Corp., 924 F.2d 195, 198 (11th Cir. 1991). We review a district court's decision to grant or deny a preliminary injunction for abuse of discretion. Cumulus Media, Inc. v. Clear Channel Commc'ns, Inc., 304 F.3d 1167, 1171 (11th Cir. 2002). If we determine the district court abused its discretion by misapprehending or misapplying the law, we review the district court's factual findings for clear error and the district court's legal conclusions de novo. Id. at 1171-72; Horton v. City of St. Augustine, Fla., 272 F.3d 1318, 1326 (11th Cir. 2001).

IV. DISCUSSION

As the District Court observed, this case "is not about the wisdom of the pat-down policy, whether the average Buccaneers fan supports or objects to the pat-down searches, or whether a judge believes the pat-downs are wise." Johnston v. Tampa Sports Auth., 442 F. Supp. 2d 1257, 1259 (M.D. Fla. 2006). The issue in this case is whether Johnston has shown a substantial likelihood of succeeding on the merits of his claim that the pat-down searches violate his rights under the constitutions of Florida and the United States.

The District Court analyzed whether to vacate the injunction under our standards for granting a preliminary injunction. A party seeking a preliminary injunction must demonstrate that: (1) he has a substantial likelihood of success on the merits; (2) irreparable injury will be suffered absent an injunction; (3) the injury to the movant outweighs the injury the proposed injunction would cause to the opposing party; and (4) the proposed injunction would serve the public interest. Klay v. United Healthgroup, Inc., 376 F.3d 1092, 1097 (11th Cir. 2004) (internal quotations omitted). The District Court found that Johnston had met his burden in showing a substantial likelihood of success on the merits of his constitutional claims and that the preliminary injunction would serve the public interest. Johnston, 442 F. Supp. 2d at 1272-73. We find that the District Court abused its discretion by misapplying the consent exception to warrantless searches, and we review the District Court's legal conclusions *de novo*.

Johnston asserts that the pat-down searches at issue are invalid under both the Florida and United States constitutions. In evaluating Johnston's claim under the Florida Constitution, we are compelled to apply the facts of this case to Florida constitutional law as interpreted by the Florida Supreme Court, and, absent a contrary ruling by the Florida Supreme Court, Florida's intermediate appellate courts. McMahan v. Toto, 311 F.3d 1077, 1080 (11th Cir. 2002), cert. denied, Nemesis Veritas, L.P. v. Toto, 539 U.S. 914 (2003); Pardo v. State, 596 So. 2d 665, 666 (Fla. 1992) ("the decisions of the district courts of appeal represent the law of Florida unless and until they are overruled by this Court.") (internal quotation marks omitted).

Article I, Section 12 of the Florida Constitution and the Fourth Amendment to the United States Constitution afford protections against "unreasonable searches and seizures." Fla. Const. Art. 1 § 12;[5] U.S. Const. amend. IV.[6] As the text of the Florida Constitution's search and seizure provision explains, the Florida Constitution affords the same protections against unreasonable searches and seizures as the Fourth Amendment, and Florida courts follow opinions of the United States Supreme Court in interpreting the Florida Constitution's search and seizure protections. State v. Peterson, 739 So. 2d 561, 564 (Fla. 1999), cert. denied, 531 U.S. 831 (2000) ("This Court is bound to follow the opinions of the United States Supreme Court concerning Fourth Amendment search and seizure issues.").

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[5] The Florida Constitution provides:

> The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, and against the unreasonable interception of private communications by any means, shall not be violated . . . . This right shall be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court . . . .

Fla. Const. Art. 1 § 12.

[6] The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV.

Our analysis of Johnston's claims under the Fourth Amendment therefore applies equally to Johnston's claims under the Florida Constitution.

The United States Supreme Court has consistently held that under the Fourth Amendment "a search conducted without a warrant issued upon probable cause is 'per se unreasonable . . . subject only to a few specifically established and well-delineated exceptions.'" Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973) (quoting Katz v. United States, 389 U.S. 347, 357 (1967)); accord United States v. Santa, 236 F.3d 662, 668 (11th Cir. 2000). "It is equally well settled that one of the specifically established exceptions to the requirements of both a warrant and probable cause is a search that is conducted pursuant to consent." Schneckloth, 412 U.S. at 219; accord State v. Iaccarino, 767 So. 2d 470, 476 (Fla. Dist. Ct. App. 2000).

Whether consent is voluntary is a fact question determined according to the totality of the circumstances. Schneckloth, 412 U.S. at 226-27; Iaccarino, 767 So. 2d at 476; United States v. Blake, 888 F.2d 795, 798 (11th Cir. 1989). Consent is determined on a case-by-case basis. Blake, 888 F.2d at 798; United States v. Garcia, 890 F.2d 355, 360 (11th Cir. 1989). Both the federal and Florida courts have enumerated non-exhaustive lists of factors to be considered in performing the analysis. We have previously identified the following non-exhaustive factors to consider in determining voluntariness: whether the person is in custody, the existence of coercion, the person's awareness of his right to refuse consent, the person's education and intelligence, and whether the person believes incriminating evidence will be found. Blake, 888

F.2d at 798 (quoting United States v. Chemaly, 741 F.2d 1346, 1352 (11th Cir. 1984)). Florida courts look for the existence of express or implied consent and consider the following implied consent factors: (1) whether the defendant was aware his conduct would subject him to search; (2) whether the search was supported by a "vital interest;" (3) whether the searching officer had apparent authority to search and arrest; (4) whether the defendant was advised of his right to refuse; and (5) whether refusal would result in a deprivation of a benefit or right. Iaccarino, 767 So. 2d at 476. Consent is not voluntary if the government conditions receipt of a right or a benefit on the relinquishment of a constitutional right. Bourgeois v. Peters, 387 F.3d 1303, 1324 (11th Cir. 2004) (citing Adams v. James, 784 F.2d 1077, 1080 (11th Cir. 1986)); Iaccarino, 767 So. 2d at 479.

For the purposes of our analysis of whether this warrantless search was unconstitutional under the United States and Florida constitutions, we accept the District Court's conclusion that the search was performed by agents of the State. Johnston, 442 F. Supp. 2d at 1264. The question then is whether the District Court abused its discretion in misapplying the consent exception to the facts of this case. We hold that Johnston voluntarily consented to the pat-down searches and thus has not shown a substantial likelihood of success on the merits.[7]

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[7] Among the exceptions to the Fourth Amendment's general warrant requirement defined by the Supreme Court are exceptions to address the "special needs" of the government beyond the "normal need for law enforcement." Ferguson v. City of Charleston, 532 U.S. 67, 74 n.7 (2001). In evaluating whether to create a "special needs" exception, courts undertake a context-specific inquiry examining the competing public or

governmental interests advanced by the searches with the private interests invaded by it. Chandler v. Miller, 520 U.S. 305, 314 (1997) (citing Nat'l Treasury Employees Union v. Von Raab, 489 U.S. 656, 665-66 (1989)); United States v. Skipwith, 482 F.2d 1272, 1275 (5th Cir. 1973) (balancing the public necessity of the search against the efficacy of the search and the degree and nature of private intrusion caused by the search). Courts have identified several areas where "special needs" justify an exception to the general prohibition against suspicionless, warrantless searches. E.g., Terry v. Ohio, 392 U.S. 1, 20-25 (1968) (stop and frisk based on individualized suspicion); Warden v. Hayden, 387 U.S. 294 (1967) (hot pursuit exception); United States v. Moreno, 475 F.2d 44 (5th Cir. 1973), cert. denied, 414 U.S. 840 (1973) (airport searches for weapons and explosives); Downing v. Kunzig, 454 F.2d 1230 (6th Cir. 1972) (searches upon entrance to federal buildings).

Because we determine the consent exception applies, we need not also consider whether any other "special needs" exception applies to this case. Considering Johnston's ticket was, on its face, only a revocable license to attend NFL games, there is in our opinion at least a question concerning whether Johnston's constitutional rights would have been violated by the pat-down search, even if he had not consented to one.

The Buccaneers licensed to Johnston a spectator's seat at its games. The Buccaneers could revoke the license and withdraw permission for Johnston or any other ticket holder to enter the Stadium during games for any reason at the Buccaneers' sole discretion, subject only to a refund. Under Florida law, a revocable license is "defined to be an authority to do a particular act, or series of acts, upon another's land without possessing any estate therein." Devlin v. The Phoenix, Inc., 471 So. 2d 93, 95 (Fla. Dist. Ct. App. 1985). A license "is not a right but is a personal privilege . . . ." Id. "A license . . . is generally revocable at the pleasure of the grantor . . . ." Dupont v. Whiteside, 721 So. 2d 1259, 1263 (Fla. Dist. Ct. App. 1998). "The distinctive characteristic of a license is that it . . . is, in its very nature, necessarily revocable at will." Devlin, 471 So. 2d at 95.

We have recently considered the constitutionality of suspicionless, warrantless searches of individuals assembling on public lands to engage in protests protected by the First Amendment. Bourgeois, 387 F.3d 1303. In Bourgeois, the appellants sought to engage in an annual protest of training

conducted at the School of the Americas at Fort Benning, Georgia. The demonstrations occurred on public property

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immediately outside of Fort Benning. The City of Columbus, Georgia instituted a policy requiring suspicionless magnetometer searches of all persons seeking to attend the demonstrations. The City justified the searches in light of past conduct at the demonstrations, including "frenzied dancing," large debris used to erect a "global village," ignition of a smoke bomb, and trespassing on the grounds of Fort Benning, in violation of 18 U.S.C. § 1382. The City also noted that unrelated protesters at other venues had allegedly instigated instances of violence, and that the Homeland Security threat assessment was elevated. Id. at 1307, 1312. We held this suspicionless search unconstitutional in violation of the First and Fourth Amendments, in part because the City had not shown its policy fell within one of the several exceptions to the Fourth Amendment's requirements.

We note the many material differences between the search policy instituted in Bourgeois and the pat-down search at issue in this case. The search reviewed by the Court in Bourgeois impeded individuals from gathering on public property – city land outside of the Fort Benning military installation – to engage in political protests protected by the First Amendment. Id. at 1325. The protestors in Bourgeois had the same general right to be in the public space shared by all citizens and a constitutional right to protest on the public lands. The City's suspicionless searches burdened both of those rights impermissibly. We also note that the magnetometer policy was developed and enacted by the City, and, as we stated, was enacted to serve the City's normal law enforcement function. Id. at 1312-1313 ("it is difficult to see how public safety could be seen as a governmental interest independent of law enforcement; the two are inextricably intertwined."); see also Iaccarino, 767 So. 2d at 473 (suspicionless searches of concert patrons required by city officers as a condition for granting a permit to hold a music festival).

Johnston had no parallel constitutional right to enter the Stadium for a Buccaneers football game. None of Johnston's other rights appear to be impeded by the pat-down searches – not even a property right, as Johnston's ticket granted only a privilege and did not guarantee him a seat. Johnston simply had no right to be in the Stadium during an NFL football game,

and the revocable license granted by his ticket made clear he could be excluded for any reason. Unlike the City's policy in Bourgeois and the permit conditions imposed by the

Johnston knew well in advance that he would be subjected to a pat-down search by the Authority if he presented himself at an entrance to the Stadium to be admitted to a Buccaneers game. That is, he chose to submit voluntarily to the search on two occasions, stating only a verbal objection followed by his submission to the pat-down search process and his ultimate entry into the Stadium to watch Buccaneers football games.

The factors we enumerated in United States v. Blake demonstrate the voluntariness of Johnston's consent. Johnston was not in custody at the time of the search, rather, he presented himself willingly at the search point. The screeners did not coerce Johnston, they merely performed the search to which Johnston submitted. Johnston was well aware of his right to refuse to submit to the pat-down search and did in fact express his objection to the searches to specific screeners and over the telephone to the Buccaneers before the searches were implemented. At the search point, Johnston pulled his shirt up (apparently to show that he was not wearing an IED) and asked not to be patted down. When screeners insisted on the pat-down before permitting Johnston to enter, Johnston elected to be patted down and thereby gain entrance to the Stadium. Johnston appears from the record

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government in Iaccarino, the pat-down policy in this case was developed and mandated by the NFL Commissioner and applied exclusively to NFL events. The NFL and the Buccaneers do not have a law enforcement function that could have been served by the pat-downs; the record reflects instead that the NFL crafted the policy solely to protect its patrons

from harm. It appears from the record that the pat-down searches did not seek to identify any illegal items other than IEDs.

to be a man of heightened intelligence and well-educated. The record shows he did not believe that the search would disclose incriminating evidence, as shown by his attempt to show screeners he was not carrying any suspicious devices under his shirt.

Johnston also impliedly consented to the search under the factors for implied consent developed by Florida courts. Johnston was well-aware his insistence in entering the Stadium would cause him to be subject to a search. The record also reflects that Johnston was aware of his ability to refuse to be searched and leave the Stadium. There is no evidence that the Authority would have detained Johnston if he refused, or that Johnston otherwise believed the searches to be compulsory.

We also conclude the searches supported a "vital interest." The NFL and the Buccaneers instituted the pat-down policy specifically to guard against mass casualties at NFL games from a potential terrorist attack. We cannot doubt the NFL's interest in protecting its patrons. Unlike the searches for drugs, bottles, and cans considered in Iaccarino, 767 So. 2d at 473, the pat-down searches in this case supported an interest well beyond general law enforcement. The NFL quite clearly instituted the pat-down policy with the intent of preventing terrorist attacks and ensuring the safety of persons in the Stadium. See id. at 478 ("We agree that the interest in protecting the performers from projectiles is a 'vital interest' that would justify a search for those items which could be used as projectiles.").

The District Court found that the consent exception did not apply in this case, in part, because

of the "unconstitutional condition" doctrine developed by federal and Florida courts. "The doctrine of unconstitutional conditions prohibits terminating benefits, though not classified as entitlements, if the termination is based on motivations that other constitutional provisions proscribe." Adams, 784 F.2d at 1080; accord Bourgeois, 387 F.3d at 1324 ("This is a classic 'unconstitutional condition,' in which the government conditions receipt of a benefit or privilege on the relinquishment of a constitutional right."); Iaccarino, 767 So. 2d at 476. The District Court erred in its application of the unconstitutional condition doctrine because in this case the condition for entry was imposed by the NFL and the Buccaneers, both private entities, and not the government. As we noted, Johnston did not have any right or entitlement to enter the Stadium. His purchase of a ticket granted him at most a revocable license to a seat. As is typical of sporting events, the NFL and the Buccaneers explicitly retained the right to exclude him from the Stadium for any reason. The NFL chose to impose a pat-down as a condition for entry. Although the Authority acquiesced to the NFL's requests by hiring screeners to conduct pat-downs, the conclusion that this policy was the NFL's – and not the Authority's – condition for entry is reinforced by the Authority's security measures at other non-NFL events at the Stadium, including collegiate football games, where the Authority does not conduct pat-downs.

In other cases where we have used the unconstitutional conditions doctrine to invalidate consent, we found that it was the government imposing the condition and performing the search. E.g., Bourgeois, 387 F.3d at 1324 (magnetometer

searches instituted by city policy). Several courts have analyzed the "unconstitutional conditions" doctrine with respect to entry to large public gatherings such as rock concerts. In each of these cases, a government search upon entry was unconstitutional because it required the patron to choose between assertion of his constitutional rights and losing paid admission to the concerts. In each of these cases the entity imposing the condition was the government itself. E.g., Nakamoto v. Fasi, 635 P.2d 946, 949 (Haw. 1981) (inspection policy imposed by the City of Honolulu); Gaioni v. Folmar, 460 F. Supp. 10, 12 (M.D. Ala. 1978) (search policy instituted by the Mayor of the City of Montgomery); Stroeber v. Comm'n Veteran's Auditorium, 453 F. Supp. 926, 929 (S.D. Iowa 1977) (search policy instituted by officials and the chief of police of the City of Des Moines); Wheaton v. Hagan, 435 F. Supp. 1134, 1139 (M.D.N.C. 1977) (search policy instituted by officials of the City of Greensboro). Cases considered by Florida courts reveal the same circumstance of the government imposing an unconstitutional condition. E.g., Iaccarino, 767 So. 2d at 473 (search policy for entry to music festival on private property mandated by city officials as a condition for the promoter's permit to hold the festival).

In this case, the government had no role in formulating or mandating the pat-down policy. The policy exists solely because of the NFL's mandate. Because the condition for entry was imposed by a private party, Johnston was not forced by the government to choose between assertion of his constitutional rights and obtaining a benefit to which he was entitled. The NFL's condition does not invalidate Johnston's voluntary consent to the pat-

downs. The unconstitutional conditions doctrine does not apply to these searches required by a private entity.

Considering the totality of the circumstances, the Court concludes that Johnston voluntarily consented to pat-down searches each time he presented himself at a Stadium entrance to attend a game. The record is replete with evidence of the advance notice Johnston was given of the searches including preseason notice, pregame notice, and notice at the search point itself. It was clear error for the District Court to find that Johnston did not voluntarily consent to the pat-down searches.

V. CONCLUSION

For the reasons stated above, we find under the unique circumstances here that the District Court abused its discretion in making its preliminary finding that Johnston did not consent to the pat-down searches and that Johnston had a right to attend games that was unconstitutionally infringed. Upon de novo consideration of the District Court's conclusions of law, we hold that Johnston has not shown a substantial likelihood of success on the merits of his constitutional claims under the Florida and United States constitutions. Accordingly, we **REVERSE** the decision of the District Court and **REMAND** for further proceedings consistent with this Opinion.

SO ORDERED.

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
JUNE 26, 2007
THOMAS K. KAHN
CLERK

No. 06-14666

D.C. Docket No. 05-02191-CV-T-27-MAP

GORDON JOHNSTON,

Plaintiff-Appellee,

versus

TAMPA SPORTS AUTHORITY, HENRY G. SAAVEDRA, in his Official Capacity as Executive Director of the Tampa Sports Authority,

Defendants-Appellants.

Appeal from the United States District Court
for the Middle District of Florida

(June 26, 2007)

Before BIRCH and FAY, Circuit Judges and DUFFEY,* District Judge

PER CURIAM:

*Honorable William S. Duffey, Jr., United States District Judge for the Northern District of Georgia, sitting by designation.

The issue before the Court is whether the district court erred when it refused to reconsider a state court's order enjoining Appellant Tampa Sports Authority's (the "Authority") policy of conducting pat-down searches of all ticket holders seeking to attend Tampa Bay Buccaneers (the "Buccaneers") games at the Raymond James Stadium in Tampa, Florida (the "Stadium"). We conclude that Johnston consented to the searches. The district court thus erred in not reconsidering the preliminary injunction. Accordingly, we reverse and remand to the district court for further proceedings consistent with this opinion.

I.BACKGROUND

In February 2005, the Authority instituted a policy requiring brief pat-down searches of all persons attending Buccaneers football games. Johnston is a Buccaneers season ticket subscriber who first became a season ticker holder in 2001, and he has renewed his season tickets each year since 2001. The season ticket is, on its face, a revocable license for entry to the Stadium to attend Buccaneers games. The Stadium is operated by the Authority, a Florida public entity. The Authority grants the Buccaneers use of the Stadium pursuant to a Stadium Agreement (the "Agreement"). The Agreement provides that the Authority remains responsible for stadium security during Buccaneers games, and obligates the Authority to "make proper rules and regulations for use of the Stadium . . . . [T]he content of such rules and regulations shall be reasonably consistent with the rules and regulations enacted for other NFL stadia."

On September 13, 2005, the Authority, at the urging of the National Football League, (the "NFL"), considered enacting a policy to conduct limited above-the-waist pat-down searches of all persons attending Buccaneers football games. The NFL urged the pat-down policy to protect members of the public who attend NFL games. The NFL concluded that NFL stadia are attractive terrorist targets based on the publicity that would be generated by an attack at an NFL game.[1] The pat-down search policy focuses on the detection of improvised explosive devices ("IED") which might be carried on a person entering a stadium.

In February 2002 the NFL first implemented a policy requiring pat-down searches for Super Bowl XXVII and other special events. The NFL later expanded the policy to require pat-down searches at all football games. These patdown searches currently are conducted at all NFL events except at the Stadium, where they have been enjoined.

The pat-down searches are conducted by outside screeners. The Authority and the Buccaneers share the expense of the screeners and the Authority

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[1]The NFL cites to the 2004 and 2005 1 suicide bombings in London and Madrid, threats made to other sporting events, including a soccer venue in Spain, and knowledge that individuals suspected to be tied to terrorist groups had downloaded information from the internet about NFL stadia in St. Louis and Indianapolis. Although the FBI later deemed the threats and the downloads not to present a threat to NFL stadia, these events formed the context in which the NFL decided to request a pat-down policy be enacted at all NFL games.

oversees how the searches are conducted.[2]

Consistent with the policy urged by the NFL, the pat-down searches at the Stadium focus on the detection of IEDs. At each admission gate, screeners ask people entering the Stadium to hold their arms out to their side, palms up. Screeners inspect the individual for wires, detonators or other telltale signs of an IED. Screeners then run their hands lightly along the sides of the torso, and down the spine. If the individual's skin is exposed, screeners do not make contact with it. If the individual has large pockets, the screener may ask him to empty them for review of any items. Female inspectors conduct searches on females, and male inspectors inspect males. Johnston was aware of the pat-down policy before the first game of the 2005 season.3 Press releases announcing the initiation of the pat-down policy were published in the media, on the Buccaneers's website and in a direct communication to season ticket holders. Stadium employees distributed notices about the pat-down policy to cars entering the Stadium parking lot before games.

Announcements were made over loudspeakers outside of the Stadium beforegames, advising those who approached the Stadium that pat-downs would be

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[2] If contraband is discovered during a search, a uniformed law enforcement officer is alerted and investigates.

[3] Before the 2005 season bags, purses, and other containers carried by those attending games were searched. Johnston did not before and does not now object to these searches.

conducted at the entrances. Multiple signs were placed along common walking routes, including those from parking areas to the Stadium, announcing the patdown policy.

Johnston called the Buccaneers's office before the first game of the 2005 season to discuss the pat-down search policy. Johnston objected to the policy, and claims that he was told that the Buccaneers would not refund the cost of season tickets based solely on his objections. He stated later he would not have accepted a refund even if offered. Having been advised of the policy, Johnston nonetheless presented himself and his ticket at an entrance to the Stadium on three occasions. On each occasion, a screener advised Johnston that a pat-down search would be performed. Johnston verbally objected to the pat-down but allowed it to be conducted so that he could attend the games. After attending the second game Johnston sued the Authority in state court, seeking to enjoin the searches. After suit was filed, Johnston attended a third game, and, after offering his objection, he again submitted to a pat-down search. After the third game the Florida state court enjoined the searches and Johnston attended subsequent games without being subjected to the search.

II. PRIOR PROCEEDINGS

On October 13, 2005, Johnston filed suit against the Authority and Henry G. Saavedra[4] in the Thirteenth Judicial Circuit of Florida. Johnston challenged the constitutionality of the pat-down searches under the Florida Constitution. Johnston sought nominal damages and an injunction prohibiting the searches. The state court found the searches unconstitutional under the Florida Constitution, and enjoined the Authority from continuing them.

The Authority appealed the ruling and the injunction automatically was stayed under Florida Rule of Appellate Procedure 9.310(b)(2). Johnston moved the Thirteenth Judicial Circuit of Florida to vacate the automatic stay. His motion was denied. Johnston filed an emergency motion with the Florida Second District Court of Appeals to vacate the stay. On November 4, 2005, the motion was granted and the stay of the injunction was vacated.

Johnston thereafter amended his complaint to add a claim under 42 U.S.C.§ 1983 that the searches violated the Fourth Amendment to the United States Constitution. On November 4, 2005, the Authority removed the case to the United States District Court for the Middle District of Florida and moved the District Court to reconsider and vacate the injunction issued by the state court.

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4 Johnston sued Defendant Saavedra in his official capacity as Executive Director of the Authority. Johnston's claims against Saavedra are indistinguishable from his claims against the Authority.

The District Court denied the motion, finding that Johnston did not consent to the patdown searches, and that the searches violated the Fourth Amendment. This appeal followed.

III.STANDARD OF REVIEW

After removal, orders issued by the state court are considered orders of the district court. Jackson v. Am. Sav. Mortg. Corp., 924 F.2d 195, 198 (11th Cir. 1991). This Court reviews for abuse of discretion the grant of a preliminary injunction. Cumulus Media, Inc. v. Clear Channel Commc'ns, Inc., 304 F.3d 1167, 1171 (11th Cir. 2002). "When reviewing a district court's entry of preliminary injunction, we review findings of fact under a clearly erroneous standard, and conclusions of law de novo." Horton v. City of St. Augustine, Fla., 272 F.3d 1318, 1326 (11th Cir. 2001).

IV.DISCUSSION

As the district court stated, this case "is not about the wisdom of . . . [the] pat-down policy, whether the average Buccaneers fan supports or objects to the pat-down searches, or whether a judge believes the pat-downs are wise." The issue in this case is whether Johnston's Fourth Amendment rights were violated by the pat-down searches.[5]

[5] Considering Johnston's ticket was only a 5 revocable license to attend games, there is in the Court's opinion at least a question concerning whether Johnston had a constitutional right to pass voluntarily through the Stadium gates without being subjected to a pat-down search, even if he had not consented to one. Under Florida law, a revocable license is "defined to be an

authority to do a particular act, or series of acts, upon another's land without possessing any estate therein." Devlin v. The Phoenix, Inc., 471 So. 2d 93, 95 (Fla. Ct. App. 1985). A license "is not a right but is a personal privilege . . . ." Id. "A license . . . is generally revocable at the pleasure of the grantor . . . ." Dupont v. Whiteside, 721 So. 2d 1259, 1261 (Fla. Ct. App. 1998). "The distinctive characteristic of a license is that it . . . is, in its very nature, necessarily revocable at will." Devlin, 417 So. 2d at 95.

The Buccaneers licensed to Johnston a spectator's seat at its games. The Buccaneers could revoke the license and withdraw permission for Johnston or any other ticket holder to enter the Stadium during games for any reason at the Buccaneers's sole discretion, subject only to a refund.

This case is thus different from that addressed by the Court in Bourgeois v. Peters, 387 F.3d 1303 (11th Cir. 2004). In Bourgeois, the appellees sought to engage in a annual protest of the training conducted at the School of the Americas at Fort Benning, Georgia. The demonstrations occurred on public property outside of the Fort Benning Military Installation and not on property of the military installation itself. The city of Columbus implemented suspicionless magnetometer searches for all seeking to attend the demonstrations. The city justified the searches in light of past conduct at the demonstrations, including "frenzied dancing," large debris used to erect a "global village," ignition of a smoke bomb, and trespassing on the grounds of Fort Benning. The city also noted that unrelated protesters at other venues had allegedly instigated instances of violence, and that the Homeland Security threat assessment was elevated. Id. at 1307.

The search reviewed by the court in Bourgeois impeded individuals from gathering on a public property–city land outside of the Fort Benning installation–to engage in political protests protected by the First Amendment. Id. at 1325. While the protestors in Bourgeois had a right to protest on public land that the magnetometer searches burdened impermissibly, Johnston had no parallel right to enter the Stadium for a Buccaneers football game. None of Johnston's other constitutional rights appear to be impeded by the pat-down searches–not even a property right, as Johnston's ticket granted only a privilege and did not guarantee him a seat.

It is axiomatic that a search conducted pursuant to voluntary consent is valid. Schneckloth

v. Bustamonte, 412 U.S. 218 (1973). Whether consent is voluntary is a fact question determined according to the totality of the circumstances. Id. at 2049-50; United States v. Blake, 888 F.2d 795, 798 (11th Cir. 1989) Consent is determined on a case-by-case basis. United States v. Blake, 888 F.2d at 798. See also United States v. Drayton, 536 U.S. 194, 203-04 (2002). Factors relevant to determining voluntariness include whether the person is in custody, the existence of coercion, the person's awareness of his right to refuse consent, the person's education and intelligence, and whether person believes that incriminating evidence will be found. Blake, 888 F.2d at 798.

Johnston knew that he would be subjected to a pat-down search by the Authority if he presented himself at an entrance to the Stadium to be admitted to a Buccaneers game. That is, he chose to submit voluntarily to the search, stating only a verbal objection followed by his submission to the pat-down search process and his ultimate entry into the Stadium to watch Buccaneers football games.

The Blake factors demonstrate the voluntariness of Johnston's consent. Johnston was not in custody at the time of the search, rather, he presented himself willingly at the search point. The screeners did not coerce Johnston, they merely performed the search to which Johnston submitted. Johnston was not under any express or implied threat of physical or other retribution if he refused to submit to the search. Johnston was well aware of his right to refuse to submit to the patdown search and did in fact express his objection to the searches to specific screeners and over the telephone to the Buccaneers. At the search point, Johnston pulled his shirt up (apparently to show that he was not

wearing an IED) and asked not to be patted down. When screeners insisted on the pat-down before permitting Johnston to enter, Johnston elected to be patted down. Johnston appears from the record to be a man of heightened intelligence and well-educated. The record shows he did not believe that the search would disclose incriminating evidence, as evidenced by his attempt to show screeners he was not carrying any suspicious devices under his shirt.

Considering the totality of the circumstances, the Court concludes that Johnston voluntarily consented to pat-down searches each time he presented himself at a Stadium entrance to attend a game. The record is replete with evidence of the advance notice Johnston was given of the searches including preseason notice, pregame notice, and notice at the search point itself. It was clear error for the district court to find that Johnston did not consent to the pat-down searches which were conducted.

IV. CONCLUSION

For the reasons stated above, we find that the District Court abused its discretion in making its preliminary finding that Johnston did not consent to the pat-down searches and that Johnston had a right to attend games that was unconstitutionally infringed. Accordingly, the Court REVERSES the decision of the District Court and REMANDS for further proceedings consistent with this Order.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

GORDON JOHNSTON,
Plaintiff,
vs. Case No. 8:05-CV-2191-T-27MAP

TAMPA SPORTS AUTHORITY and HENRY G. SAAVEDRA, in his official capacity as Executive Director of the TAMPA SPORTS AUTHORITY,
Defendants.
_____/

ORDER

BEFORE THE COURT is Defendants' Motion to Reconsider, Vacate, and Dissolve the Preliminary Injunction (Dkt. 7) and Plaintiff's Response in Opposition (Dkt. 23). Argument on Defendant's motion was heard on July 13, 2006. After careful consideration of the parties' briefs and the record before the state court, Defendants' Motion to Reconsider, Vacate and Dissolve the Preliminary Injunction is DENIED. The mass suspicionless pat-downs implemented by the Tampa Sports Authority ("TSA") for NFL games at Raymond James Stadium ("Stadium") constitute unreasonable searches under the Florida Constitution and the Fourth Amendment to the United States Constitution.[1]

[1] Article I, Section 12 of the Florida Constitution affords the same protections against unreasonable searches and seizures as the Fourth Amendment to the United States Constitution. *See State v. Peterson*, 739 So. 2d 561, 564 (Fla. 1999).

The TSA has not established that its concern for public safety is based on a substantial and real risk which would justify a "special needs" exception to the well-established rule that suspicionless searches of one's person are per se unreasonable. Moreover, the TSA has not demonstrated that this case presents one of the very limited instances where the Plaintiff's privacy interest is minimal and the TSA's public safety interest would be jeopardized by prohibiting mass suspicionless pat-downs at the Stadium.

Before embarking upon a complex constitutional analysis, it is important to emphasize what this case is *not* about. It is not about the wisdom of the pat-down policy, whether the average Buccaneers fan supports or objects to the pat-down searches, or whether a judge believes the pat-downs are wise. [2] The Eleventh Circuit has cautioned that "[c]onducting an *ad hoc* analysis of the reasonableness of the search based on the judge's personal opinions about the governmental and privacy interests at stake, instead of applying the

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[2] The TSA implemented pat-downs after the NFL and the Buccaneers "mandated" them. The NFL's concern over potential terrorist attacks at its stadiums was the reason for the NFL's mandate. The NFL's concern for the safety and well being of its patrons and the good intentions behind the pat-down policy cannot reasonably be criticized. The Fourth Amendment, however, requires a constitutional analysis that may or may not be consistent with the NFL's rationale for mandating pat-downs. Moreover, and most importantly from a constitutional perspective, it is the action of the TSA, a public agency created by Florida law that is subject to Fourth Amendment scrutiny, not that of the NFL.

Supreme Court's well-established per se rules regarding warrants, prior judicial scrutiny of proposed searches, probable cause, and individualized suspicion ignores [ ] crucial Fourth Amendment principles." Bourgeois v. Peters, 387 F.3d 1303, 1314 (11th Cir. 2004) (citations omitted).

"The Fourth Amendment embodies a value judgment by the Framers that prevents us from gradually trading ever-increasing amounts of freedom and privacy for additional security. It establishes searches based on evidence-rather than potentially effective, broad prophylactic dragnets-as the constitutional norm." Bourgeois, 387 F.3d at 1312 (emphasis added). The constitutionality of the pat-down searches is determined by a careful and considered analysis of the evidence presented in justification of the pat-downs, specifically an analysis of whether that evidence demonstrates a "substantial and real" risk of a terrorist attack on an NFL stadium. Chandler v. Miller, 520 U.S. 305, 323 (1997). Only under this very limited circumstance has the Supreme Court authorized an exception to the general rule that suspicionless searches, such as the pat-down searches implemented by the TSA, are per se unconstitutional. See id.

Procedural and Factual Background

This case was originally filed in the Circuit Court of Hillsborough County, Florida by Plaintiff, a Tampa Bay Buccaneers season ticket holder, against the TSA and its Executive Director, Henry G. Saavedra. In his initial lawsuit, Plaintiff sought declaratory and injunctive relief, contending that the mass suspicionless pat-downs of patrons attending Buccaneers games at the Stadium implemented by

the TSA violate his constitutional rights under Article 1, Section 12 of the Florida Constitution. The state court conducted an evidentiary hearing on Plaintiff's emergency motion for preliminary injunction and thereafter granted an injunction prohibiting the pat-downs.[3] (App. 7, 8).

The Tampa Bay Buccaneers, a NFL franchise, plays its home football games at the Stadium pursuant to the Buccaneers' Stadium Agreement with the TSA. (App. 7, p. 32). The Stadium hosts other events as well, including University of South Florida Bulls football games, high school events and "monster truck pulls." (App. 7, p. 25). In August 2005, the NFL declared that all persons attending NFL games be physically searched before entering NFL stadiums. (App. 4, Hast Aff., 9; App. 8, p. 44). The pat-downs were implemented to address the perceived risk of detonation of an "improvised explosive device" ("IED").[4] (App. 4, Hast Aff., ¶ 9).

The TSA is a public entity created by the Florida legislature. Pursuant to that authority, the TSA operates the publicly-owned Stadium. (App. 7, pp. 21-22). During its September 13, 2005 board meeting, at the request of representatives of the NFL and Buccaneers, the TSA authorized pat-down

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[3] Record citations are to the Appendix filed in the TSA's interlocutory appeal of the preliminary injunction order.

[4] Examples of IEDs include "suicide bomber" belts and vests. (App. 4, Hast Aff., ¶ 8).

searches of every person who enters the Stadium to attend Buccaneers games. (App. 8, pp. 111-12). Recognizing the constitutional implications of mass suspicionless searches, on advice of counsel, the TSA also voted to recommend that the Buccaneers refund ticket prices to any fan who objected to the pat-downs. (App. 17, pp. 10-11, 26)

At the TSA's expense, private "screeners" were hired to physically pat down each patron as he or she enters the gate. (App. 7, p. 34; App. 8, pp. 60-61, 126-27, 131). Generally, the pat-down is performed above the patron's waist. If the security personnel observe suspicious bulges, the screener may pat the pockets and instruct the patron to empty them. (App. 8, pp. 60-61; App. 4, ¶¶ 11-14). The screener "conducts a visual inspection of the person by asking the person to extend his arms sideward and upward, parallel to the ground, with palms facing up, and then visually inspect[s] the person's wrists and arms for switches, wires, or push-button devices." The screener then conducts a "physical inspection by touching, patting, or lightly rubbing the person's torso, around his waist, along the belt line" and "touches, pats, or lightly rubs the person's back along the spine from the belt line to the collar line." (App. 4, Hast Aff., ¶¶ 11-13). Anyone found to be carrying contraband is detained while the police are summoned. (App. 7, p. 99; App. 8, pp. 89-92, 129-30). Anyone who refuses to be patted down is denied entry into the Stadium.

Plaintiff has been a Buccaneers season ticket holder since the 2001-2002 season. (App. 7, p. 54). To become a season ticket holder, he was required to pay a seat deposit in addition to the annual price of his tickets. (App. 7, pp. 54-55). Plaintiff renewed his season tickets for the 20052006 season. At that time,

he was not given notice that he would be subjected to a pat-down search before entering the Stadium.[5] (App. 7, pp. 56-58). After the TSA adopted the pat-down policy, Plaintiff contacted the Buccaneers to complain. He was told that the Buccaneers would not refund his season ticket price. (App. 7, pp. 62, 77-78). Even if Plaintiff were permitted to return his 20052006 tickets for a refund, he would lose the remainder of his seat deposit and would be relegated to the bottom of a long waiting list in the event he desired to purchase season tickets in the future. (App. 7, pp. 77-78). During the 2005-2006 season, Plaintiff attended several Buccaneers games. (App. 7, pp. 55, 63). Prior to being patted down, he stated that he "do[es] not consent to the search." (App. 7, pp. 63-64).

[5] During the hearing on July 13, 2006, counsel represented that Plaintiff renewed his season tickets for the 20062007 season. According to counsel, at the time Plaintiff renewed his tickets, he was not certain that the pat-down searches would be implemented because the preliminary injunction was in effect.

In granting Plaintiff's motion for an emergency temporary injunction, the state court concluded that Plaintiff was likely to succeed on his constitutional claim. (App. 12). The court issued a preliminary injunction enjoining Defendants from conducting "mass suspicionless pat-down searches of every person attending Bucs games at [the Stadium]." [6] (App. 12). In November 2005, Plaintiff amended his complaint, adding claims that the pat-down searches violate the Fourth

Amendment to the United States Constitution and 42 U.S.C. § 1983. On November 30, 2005, Defendants removed the case to federal court, asserting federal question jurisdiction. (Dkt. 1). Pursuant to Fed. R. Civ. P. 59(e), Defendants request that this Court reconsider, vacate and dissolve the preliminary injunction issued by the state court. (Dkt. 8).

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[6] Defendants appealed the state court's decision to the Florida Second District Court of Appeal. Pursuant to Fla. R. App. P. 9.310(b)(2), the preliminary injunction was automatically stayed pending appeal. On Plaintiff's motion, the appellate court vacated the automatic stay. Tampa Sports Authority v. Johnston, 914 So. 2d 1076, 1084 (Fla. 2d DCA 2005). The injunction, therefore, remains in effect. Id.

Applicable Standards

After removal, orders issued by the state court are considered orders of the district court. *See Jackson v. Am. Sav. Mortgage Corp.*, 924 F.2d 195, 198 (11th Cir. 1991) ("[a]fter removal, state court proceedings are treated as those of the district court and the district court naturally is able to reexamine its own proceedings") (citations omitted). "A federal district court may dissolve or modify injunctions, orders, and all other proceedings which have taken place in state court prior to removal." *Id.* Reconsideration ensures that any alleged errors brought to the federal appeals court "*are in fact* as well as in theory *the considered products of a district judge.*" *Resolution Trust Corporation v. Bakker*, 51 F.3d 242, 244-45 (11th Cir. 1995) (citations omitted).

Rule 59(e), which permits motions to alter or amend a judgment, is the proper procedural vehicle by which the district court may entertain a motion to reconsider an order entered by the state court prior to removal. *Id.* The district court "should evaluate and resolve a Rule 59 motion in these circumstances just as it would a motion to vacate a judgment originating in federal court . . ." *Bakker*, 51 F.3d at 245. Rule 59(e) gives the court broad discretion to reconsider an order. *See O'Neal v. Kennamer*, 958 F.2d 1044, 1047 (11th Cir. 1992) ("[t]he decision to alter or amend a judgment is committed to the sound discretion of the district court").

The purpose of a preliminary injunction is to protect against irreparable injury and preserve the *status quo* until the district court renders a meaningful decision on the merits. *See Canal Auth.*

of State of Florida v. Callaway, 489 F.2d 567, 572 (5th Cir. 1974).[7] A district court may grant a preliminary injunction only if the moving party shows that: (1) he has a substantial likelihood of success on the merits; (2) irreparable injury will be suffered unless the injunction issues; (3) the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party; and (4) if issued, the injunction would not be adverse to the public interest. *Klay v. United Healthgroup, Inc.*, 376 F.3d 1092, 1097 (11th Cir. 2004).

Discussion

Defendants seek reconsideration of the preliminary injunction, arguing Plaintiff failed to establish that he is likely to succeed on the merits of his constitutional claims. Defendants contend Plaintiff is not likely to prevail because: (1) the TSA's role in implementing the pat-down policy does not constitute "state action"; (2) the pat-down searches are not unreasonable because the TSA demonstrated a "special need" and because the Plaintiff has no reasonable expectation of privacy at the NFL games; (3) Plaintiff impliedly consented to the pat-down search; and (4) the equities weigh in favor of public safety and against issuance of an injunction.

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[7] The Eleventh Circuit adopted as binding precedent all decisions the former Fifth Circuit made prior to October 1, 1981. *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981).

State Action

The Fourth Amendment to the United States Constitution and Article 1, Section 12 of the Florida Constitution guarantee the right to be free from "unreasonable searches and seizures . . .." *State v. Iaccarino*, 767 So. 2d 470, 475 (Fla. 2d DCA 2000); *United States v. Jacobsen*, 466 U.S. 109, 113 (1984). "Implicit in that guarantee is the requirement that an agent of the government perform those searches and seizures." *Iaccarino*, 767 So. 2d at 475 (citing *Burdeau v. McDowell*,

256 U.S. 465, 475 (1921)). A variety of tests have been employed to determine whether conduct constitutes state action. At the heart of each test is the requirement that "the conduct allegedly causing the deprivation of a federal right" be "fairly attributable to the State." *Gallagher v. Neil Young Freedom Concert*, 49 F.3d 1442, 1447 (10th Cir. 1995) (quoting *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982)). A plaintiff must demonstrate that the alleged deprivation of constitutional rights was "caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible." [8] *Id.*

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[8] Conduct that constitutes "state action" under the Fourth Amendment necessarily constitutes conduct "under color of law" for purposes of determining § 1983 liability. *Gallagher*, 49 F.3d at 1447 (citing *Lugar*, 457 U.S. at 935)). Accordingly, cases analyzing whether a party acted "under color of law" pursuant to § 1983 are instructive.

Defendants contend the pat-downs were not performed by state actors because the TSA was not "acting in a governmental capacity" and was "not performing a governmental function" when it voted to implement the pat-down searches. According to Defendants, the TSA was acting as a "managing agent" pursuant to the Stadium Agreement it executed with the Buccaneers. Defendants maintain the TSA instituted the pat-downs because the Buccaneers requested that it do so, pointing out that the policy was "reasonably consistent' with rules for similar NFL stadiums" and therefore, the TSA was contractually obligated to implement the policy. Defendants' arguments are unpersuasive.

The TSA is a public agency created by the Florida legislature "for the purpose of planning, developing, and maintaining a comprehensive complex of sports and recreation facilities for the use and enjoyment of the citizens of Tampa and Hillsborough County, as a public purpose." *State v. Tampa Sports Authority*, 188 So. 2d 795, 796 (Fla. 1966) (citing Ch. 65-2307, Laws of Fla., Acts of 1965). The TSA cannot transform its actions as a public agency into that of a private actor simply because it has a contractual obligation to provide security for the Buccaneers games under the terms of the Stadium Agreement. When the TSA decided to implement the pat-down searches, it acted in its capacity as a public agency entrusted with the responsibility of maintaining the Stadium. Simply put, the TSA cannot contract away its public status. Likewise, it cannot contractually obligate itself to perform its responsibility to maintain the Stadium in an unconstitutional manner.[9]

Similarly, that the pat-downs are conducted by a private security company does not insulate the searches from state action status. Contrary to the TSA's contention, the evidence demonstrates that the screeners who performed the searches were acting as instruments of the TSA for purposes of a state action analysis. The TSA voted to implement the pat-down policy, hired the security company to perform the pat down searches, dictated the security company's duties, and paid the security company with taxpayer dollars. The alleged constitutional deprivation was caused by the exercise of a policy created and imposed by the TSA and implemented by people for whom the TSA was responsible. There is, therefore, a sufficiently close nexus between the TSA and the challenged conduct such that the conduct may be fairly treated as that of the TSA itself. *See Gallagher,* 49 F.3d at 1450 (recognizing that if appellants "could demonstrate that the pat-down searches directly resulted from the University's policies then the required nexus" and in turn, state action, "would be established"); *Iaccarino,* 767 So. 2d at 475 (off-duty police officers, hired by private concert promoter to provide security, are state actors where sheriff's office had discretion to assign officers and officers had "complete discretion" as to how to conduct the searches).[10]

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[9] The TSA provides no authority to support its argument that its contract with a private entity or its contractual obligation to provide security absolves it from traditional constitutional limitations and restraints placed on state actors. TSA's reliance on cases involving preemption, tax exemption, the market-participant doctrine, and the dormant commerce clause are simply misplaced and unpersuasive.

Finally, Defendants contend the pat-down searches are not state action because they were conducted for the purpose of maintaining security and not for law enforcement purposes. Defendants point out that the "mere fact that police are able to observe the screeners conduct the pat-down searches does not render the searches 'state action.'" (Dkt. 8, p. 10).[11] Whether and to what extent law enforcement participated in the pat-down searches and whether TSA's public safety and security interests are independent of a general interest in law enforcement is not determinative to the state action analysis, however. As discussed, the pat-down searches constitute state action because the TSA, acting as a public entity fulfilling its public purpose,

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10 The cases Defendants rely on in support of their argument that the TSA's actions in connection with the pat-down searches do not constitute state action are inapposite. See Gallagher, 49 F.3d 1442; National Broadcasting Co. v. Communications Workers of America, AFL-CIO, 860 F.2d 1022 (11th Cir. 1988). In both Gallagher and NBC, a private entity either made the decision that allegedly deprived the plaintiffs of their constitutional rights or exercised control over the conduct that allegedly deprived the plaintiffs of their constitutional rights. See Gallagher, 49 F.3d at1445 (no state action where private concert promoter made decision to hire security company that performed pat-down searches and discussed procedures for pat-down searches with security personnel); National Broadcasting Co., 860 F.2d at 1027-28 (no state action where private entity renting City of Miami Convention Center made decision to exclude plaintiff from event; City of Miami did not dictate, control or participate in alleged unconstitutional conduct).

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[11] The evidence presented at the preliminary injunction indicates that the police officers were prepared to do more than just observe the pat-down searches. Robert Hast, the NFL's

Director of Event Security, testified that "[w]e requested that stadiums place a law-enforcement officer at each of the gates to support the private security because they don't have authority to make arrests. . .." (App. 8, p. 91). According to Hast, the screeners were trained to call law enforcement over to detain or arrest any individual found to have contraband. (App. 8 pp. 90-94, 129-31).

Similarly, Mickey Farrell, TSA's Director of Operations, testified that police officers are strategically positioned near the screeners and have discretion to conduct "extended searches," if necessary. At the September 15, 2005 TSA board meeting, Farrell testified:

> [F]or every eight lines we have out there, there will be three officers behind, and there will be two sentry supervisors behind. So you will have five people between basically the entrance gate and the actual person conducting the pat-down. . . . if you find something or you want to do an extended search, I guess, for lack of a better term, we will bring you over to the side and bring you over to the police officer, if we suspect something. Say you come up and you've got these big baggy pants and you have this big thing sticking out and you don't want to take it out of your pocket, we will bring you over to the side and we will have a wand there and the officer can decide what to do with you next.

(App. 17, p. 17).

implemented the pat-down policy, hired and supervised the security personnel and paid for the searches with public funds. Under such circumstances, the pat-down searches constitute state action for purposes of a Fourth Amendment search and seizure analysis. See e.g., Stroeber v. Commission Veteran's Auditorium, 453 F. Supp. 926, 931 (S.D. Iowa 1977) (state action where Commissioners "purported to act in a capacity made possible by virtue of state statutes and were acting to provide security for a public facility financed by public monies").

The Reasonableness of the Pat-Down Searches

"The Fourth Amendment requires government to respect the right of the people to be secure in their persons . . . against unreasonable searches and seizures. This restraint on government conduct generally bars officials from undertaking a search or seizure absent individualized suspicion." *Chandler*, 520 U.S. at 308 (citations and quotations omitted). The sanctity of one's person is, therefore, the starting point for the requisite Fourth Amendment analysis.

The Supreme Court, in scrutinizing a stop and frisk of an individual suspected of being involved in criminal activity, found the frisk to be a "serious intrusion upon the sanctity of the person . . . not to be undertaken lightly." *See Terry v. Ohio*, 392 U.S. 1, 17 (1968). The Court rejected the argument, one that might be made here, that a frisk was a mere "petty indignity." *Id.* While the frisk in *Terry* was arguably more intrusive than the pat-downs conducted by the TSA at the Stadium, the Court's analysis in *Terry* is instructive, as the Court

reasoned that "the sounder course is to recognize that the Fourth Amendment governs all intrusions by agents of the public upon personal security" and that "the scope of the particular intrusion, in light of all the exigencies of the case" is the "central element in the analysis of reasonableness." *Id.* at 19. *Terry* requires, therefore, that a search of an individual must be premised on "specific and articulable facts which, taken together with rationale inferences from those facts, reasonably warrant that intrusion." *Id.* at 21. "[A]nything less would invite intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulable hunches, a result this Court has consistently refused to sanction." *Id.* at 22. Consistent with the Court's analysis in *Terry*, mass suspicionless searches have been uniformly prohibited, absent certain narrow exceptions.

The "Special Needs" Exception

Recognizing that there are circumstances in which a compelling governmental interest will outweigh an individual's right to be free from suspicionless searches, the Supreme Court has carved out a narrow exception in instances where suspicionless searches are implemented "to further 'special needs' beyond the normal need for law enforcement." *Bourgeois*, 387 F.3d at 1312 (citations omitted). In order to justify the "special needs" exception, however, the risk to public safety must be "substantial and real." *Chandler*, 520 U.S. at 323. Accordingly, the "proffered special need . . . must be *substantial* – important enough to override the individual's acknowledged privacy interest, sufficiently vital to suppress the Fourth

Amendment's normal requirement of individualized suspicion." *Id.* at 318 (emphasis added). There must also be a "*concrete danger* demanding departure from the Fourth Amendment's main rule," such that the hazard or threat is "*real and not simply hypothetical.*" *Id.* at 318-19 (emphasis added). A "special need" cannot be demonstrated by the "gravity of the threat" alone or the "severe and intractable nature of the problem." *See City of Indianapolis v. Edmond*, 531 U.S. 32, 42-43 (2000). In cases applying the "special needs" exception, some evidentiary justification for the suspicionless searches has been demonstrated.[12]

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[12] *See Board of Ed. of Independence 92 v. Earls*, 536 U.S. 822, 835-36 (2002) (suspicionless drug testing program for students engaged in extracurricular activities upheld where Government presented specific evidence of drug use at particular school, including teachers' testimony of witnessing students under the influence and where police found drugs or drug paraphernalia in vehicle driven by extracurricular club member); *Vernonia School Dist. 47J v. Acton*, 515

U.S. 646, 650 (1995) (suspicionless drug testing program for high school students engaged in interscholastic athletic competitions upheld where the district court's findings included an "immediate crisis" caused by "a sharp increase in drug use" and that student athletes were not only "among the drug users" but also "leaders of the drug culture"); *Michigan Dept. of State Police v. Sitz*, 496 U.S. 444, 447 (1990) (sobriety checkpoint upheld where court found "[d]runk drivers cause an annual death toll of over 25,000 and in the same span cause nearly one million personal injuries and more than five billion dollars in property damage"); *Skinner v. Railway Labor Executives Assn.*, 489 U.S. 602, 607-08 (1989) (upholding Federal Railroad Administration's adoption of drug testing of employees involved in train accidents and employees who committed certain safety rules where testing was adopted in response to evidence of drug and alcohol abuse by some railroad employees, the obvious safety hazards posed by such abuse, and the documented link between drug and alcohol impaired

employees and the incidence of train accidents); *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 669 (1989) (drug testing for Customs employees seeking promotion upheld even though Government did not demonstrate an existing problem of drug abuse but where it was demonstrated that Customs' officers "ha[d] been the targets of bribery by drug smugglers on numerous occasions" and several had succumbed to the temptation).

"When such 'special needs'. . . are alleged in justification of a Fourth Amendment intrusion, courts must undertake a context-specific inquiry, examining closely the competing private and public interests advanced by the parties." *Chandler*, 520 U.S. at 314. In doing so, "the Court must consider the nature of the interests threatened and their connection to the particular law enforcement practices at issue." *Edmond*, 531 U.S. at 43-44.

Defendants contend the "special needs" exception justifies mass suspicionless pat-downs of NFL patrons because of the need to protect patrons against potential terrorist attacks. One cannot seriously dispute the magnitude of the threat of terrorism to this country or the Government's interest in eradicating it. In this regard, the TSA's "special need" to prevent terrorist attacks is "substantial," as that requirement is defined in Chandler. Likewise, any reasonable person appreciates the potential harm that would result from a terrorist attack at the Stadium. However, the gravity of the threat cannot alone justify the intrusiveness of a suspicionless search of Plaintiff's person. See Edmond, 531 U.S. at 42-43 (gravity of drug problem alone insufficient to justify canine and visual inspections of vehicles). To warrant the intrusion on Plaintiff's fundamental right to be free from suspicionless pat-down searches, the specific threat that the TSA seeks to prevent, that of a terrorist attack on the Stadium, must be a "concrete danger," "real," and "not hypothetical." A generalized threat of a terrorist attack will not suffice. Bourgeois, 387 F.3d at 1311 (rejecting general evidence of a threat of terrorism, such as the Department of Homeland Security's elevated threat advisory level, as insufficient to justify a "special

needs" exception to a suspicionless search). Although the record demonstrates a generalized threat of terrorism to large gatherings, the TSA has not met its burden of establishing a "substantial and real" risk of a terrorist attack at an NFL stadium.

During the preliminary injunction hearing, Roland Manteiga, a TSA board member, testified that prior to the TSA vote adopting the NFL's pat-down policy, there was no testimony or evidence of a particularized threat to NFL games or to the Stadium. (App. 7, pp. 24-25). The minutes of the September 13, 2005 board meeting confirm that although concerns of an attack were discussed, no evidence of a threat to NFL stadiums was presented. Moreover, in the aftermath of September 11, 2001, the TSA rejected pat-downs on two separate occasions, finding them unnecessary.[13] (App. 7, pp. 22-23). According to Manteiga, the "biggest difference" between the two votes against the pat-downs and the third vote to implement the pat-downs was that the NFL "mandated" implementation of the pat-downs prior to the third vote. (App. 7, pp. 31-32).Likewise, Mickey Farrell, TSA's Director of Operations, testified that the pat-downs were "mandated" by the NFL and the Buccaneers. (App. 8, p. 112).

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[13] Mickey Farrell, TSA's Director of Operations, testified that the TSA had received a telephone threat two years prior to its vote to implement the pat-down policy. The telephone threat was investigated and determined to be a false alarm. (App. 8, pp. 128-129). The TSA choose not to implement pat-down searches in response to the threat. *Id.*

The minutes of the September 13, 2005 board meeting confirm that the TSA adopted the pat-down policy solely because of the NFL's mandate. (App. 17).

During the preliminary injunction hearing, the TSA presented testimony describing what the NFL relied on in mandating pat-downs at all NFL games. The information dealt primarily with threats to the transportation industry rather than sports or stadium events. Robert Hast, the NFL's Director of Event Security, testified that the NFL decided to implement the pat-down policy after the alert to the "transportation industry" was heightened. (App. 8, p. 44).

While Hast testified that the NFL relied on information from "government agencies, the State Department, the FBI, the Secret Service, the New York Police Department, as well as the joint terrorist task force," he identified only two specific reports of terrorist threats. [14] The first and most troubling report was a CBS news report from July 2002 that persons associated with terrorist groups had downloaded images from the internet of NFL stadiums in Indianapolis and St Louis. (App. 8, pp. 52-53; App. 24). However, according to the report, the FBI investigated that incident and determined

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[14] Hast testified that "a great deal of [the] information [the NFL relied on] . . . is public information," but that "some of it is law-enforcement sensitive." (App. 8, p. 46). If that statement suggests that the NFL relied on sensitive law enforcement evidence demonstrating a "substantial and real" threat to NFL games in addition to what was presented, it was incumbent upon the TSA to present that evidence, perhaps *in camera*.

that it presented no threat, "not even a perceived or implied threat." (App. 8, pp. 84-85; App. 24). The FBI field director was quoted as saying there was no need to alter attendance policies at NFL games. (App. 8, pp. 84; App. 24).[15]

The second report relied on by the NFL was issued in April 2005 by the U.S. Department of State in its "Country Reports on Terrorism 2004." (App. 23). The Report included a summary of terrorist threats in Spain, which included an incident in March 2004 when a bomb was detonated on a commuter train and the arrest in November 2004 of individuals linked to a radical Islamic organization. (App. 8, p. 53; App. 23, p. 52). The arrest reportedly disrupted "apparent plans" to bomb Spain's High court, Madrid's largest soccer stadium, office buildings and other public landmarks. (App. 8, p. 55; App. 23, p. 52).

The TSA also submitted a Joint Information Bulletin issued by the Department of Homeland Security (DHS) on October 4, 2005 identifying"tourist facilities" as "potentially

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[15] Notwithstanding the age of the report and the FBI's determination that the incident did not require any change in attendance policies at NFL games, Hast intimated in his testimony that he was privy to sensitive law enforcement intelligence that provided more specific information about the individuals involved and their alleged ties to Al Qaeda. If that information exists, it was likewise incumbent upon the TSA to present it, particularly given the inference Hast draws from the information, that "[i]t tells you that people in Al Qaeda were interested in our stadiums."

attractive [terrorist targets.]" (App. 3, Ex. B, p. 2). Notably, the Bulletin was issued after the TSA voted to implement the pat-down policy. In the Bulletin, tourist attractions such as the Washington Monument, Statue of Liberty, Empire State Building, and Golden Gate Bridge, among others, were listed as potential targets. (App. 3, Ex. B, p. 2). The TSA contends the Bulletin is relevant despite its focus on tourist attractions because within the Bulletin, the DHS acknowledged that the list of facilities provided was not exhaustive and did not preclude "other facilities where people gather for leisure, entertainment, or vacation – such as sporting events or shopping destinations – as potential targets for terrorist attack." Significantly, however, the DHS expressly stated that "there is currently no credible or specific intelligence regarding the possibility of such attack in the United States." (App. 3, Ex. B, p. 1). Notably absent from the DHS's "suggestive protective measures" was a recommendation that suspicionless pat-down searches be conducted on patrons visiting any of the identified tourist facilities. (App. 3, Ex. B, pp. 3-7)

The only additional evidence presented by the TSA was evidence of a general concern that public events at which large crowds gather could be potential targets of terrorism. Christopher Ronay, President of the Institute of Makers of Explosives (a safety and security association representing the commercial explosives industry) testified that in his opinion NFL games "could be a very attractive target for terrorists, *as could any large venue or venue where people gather in great numbers . . .*," which in his opinion would include "churches, transportation venues, stadiums" and "shopping malls." (App. 7, pp. 153, 166-67) (emphasis added). Ronay testified

that he was not aware of any specific threat to an NFL stadium.[16] (App. 7, p. 153).

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[16] Defendants also contend that the "Federal Government, including Congress, considers sports stadiums at risk of terrorist attack" because the Federal Aviation Administration issued a no-fly zone over "any major professional or collegiate sporting event or any other major open air assembly of people unless authorized by [air traffic control]." (Dkt. 8, pp. 2-3, 12); *see also Cleveland Nat'l Air Show, Inc. v. U.S. Dep't of Transp.*, 430 F.3d 757, 758 (6th Cir. 2005) (recognizing the no-fly zone as an enhanced security restriction issued after the air attacks on the Pentagon and World Trade Center)).

One cannot question, particularly in the aftermath of September 11, 2001, the wisdom of implementing a no-fly zone over NFL stadiums. All of the experts agree that NFL stadiums and large public venues are attractive targets. That is not to say, however, that Congress' recognition of NFL stadiums as potential terrorist targets demonstrates a "special need" to conduct mass suspicionless pat-downs of NFL patrons. As discussed, general evidence of a threat of terrorism does not satisfy the requisite need for a "substantial and real" risk justifying relinquishment of fundamental Fourth Amendment protections based on "special needs."

In summary, the evidence establishes that the NFL implemented a pat-down policy as a broad prophylactic measure in response to a general threat that terrorists might attack any venue where a large number of Americans gather. The TSA adopted that policy because it was "mandated" by the NFL and the Buccaneers and because the TSA believed it had a contractual obligation to do so. While the intentions underlying the pat-down policy are commendable, the evidence the TSA presented in support of a "special needs" exception is not sufficient to demonstrate the requisite "real" and "concrete danger" to public safety at the Stadium. See Chandler, 520 U.S. at 323.

The relatively dated and largely non-specific evidence presented by the TSA stands in contrast to the quantity and quality of evidence which has been found sufficient to justify mass suspicionless container searches, a search unquestionably less intrusive than the pat-downs. See Downing v. Kunzig, 454 F.2d 1230, 1231-32 (6th Cir. 1972) (mass suspicionless searches of packages and briefcases in federal building held constitutional where "threat to federal property as well as to the safety of federal personnel . . . was direct and immediate and likely to materialize into acts of violence and destruction in any part of the nation"; search was implemented only after "an outburst of acts of violence, bombings of federal buildings and hundreds of bomb threats, resulting in massive evacuations of federal property and direct financial loss to the Government") (emphasis added); Macwade v. Kelly, 2005 WL 3338573 (S.D.N.Y. Dec. 7, 2005) (random subway container search held constitutional under "special needs" exception where Commissioner testified that 40 to 50 percent of

terrorist attacks around the world are directed against transportation systems, NYC's mass transit system, including the subway system, had been targeted by terrorists in the past, and within the last year terrorists had bombed commuter trains in Madrid, the subway system in Moscow and had attempted to bomb the London subway system).[17]

A finding of "special needs" based on evidence that supports only a general fear of terrorist attacks would essentially condone mass suspicionless searches of every person attending any large event, including, for example, virtually all professional sporting events, high school graduations, indoor and outdoor concerts, and parades. While a generalized threat of terrorism in this country and around the world is well documented, on this record, the TSA has not presented evidence that the threat of a terrorist attack on an NFL stadium is "concrete" or "real."[18]

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[17] *Compare Wilkinson v. Forst*, 832 F.2d 1330, 1340 (2d Cir. 1987), *cert. denied*, 485 U.S. 1034 (1988) (upholding magnetometer searches at KKK rally as constitutional, but finding pat-down searches excessive and unconstitutional even though evidence demonstrated a history of violence at KKK rallies, including reliable information from undercover agent that some attendees would be armed and ready to attack).

[18] As it has been applied, *Chandler's* "substantial and real" standard does not require that the TSA establish that an attack on an NFL stadium is certain or imminent.

Plaintiff's Privacy Interest

Putting aside that the TSA failed to demonstrate a "substantial and real" threat to NFL stadiums, the TSA has likewise not established that Plaintiff enjoys only a diminished expectation of privacy when attending an NFL game or that the TSA's interest in protecting patrons against terrorist attacks would be placed in jeopardy by a requirement of individualized suspicion. The Supreme Court has cautioned that only "[i]n limited circumstances, *where the privacy interests implicated by the search are minimal*, and where an important governmental interest furthered by the intrusion *would be placed in jeopardy by a requirement of individualized suspicion*, may a search be reasonable despite the absence of such suspicion." *Chandler*, 520 U.S. at 314 (citations omitted) (emphasis added).

"No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law." *Terry*, 392 U.S. at 9 (citations omitted). "[T]he Fourth Amendment protects people, not places . . . and wherever an individual may harbor a reasonable 'expectation of privacy' . . . he is entitled to be free from unreasonable governmental intrusion." *Id.* (internal citations and quotations omitted). "In their persons and property . . . individuals are not shorn of all Fourth Amendment protection when they step from their homes onto the public sidewalks." *Bourgeois*, 387 F.3d at 1315 (citations and quotations omitted).

Defendants have presented no persuasive authority establishing that Plaintiff had a minimal expectation of privacy simply because he attends NFL games. To the contrary, the Eleventh Circuit has held that "[t]he text of the Fourth Amendment contains no exception for large gatherings of people." *Bourgeois*, 387 F.3d at 1311. "The need to apply [the Supreme Court's well-established *per se* rules regarding warrants, probable cause and individualized suspicion] reaches all searches, whether of the home, office, person, or other location." *Id.* at 1314. Defendants' assertion that Plaintiff enjoyed a diminished or minimal expectation of privacy because he attended a Buccaneers game is contrary to Eleventh Circuit precedent and otherwise unpersuasive.

Also important to a comprehensive Fourth Amendment analysis is consideration of the degree of the intrusion imposed by the pat-down search on Plaintiff's privacy right. "[A] frisk is considered a gross invasion of one's privacy." *United States v. Albarado*, 495 F.2d 799, 807 (2d Cir. 1974) (recognizing that airport "frisks" of individuals who set off a magnetometer "may be more in the nature of a 'pat-down'"). Pat-downs or searches of an individual's person have been regarded as far more intrusive than container searches, sniff searches performed by canines, and magnetometer searches applied to the public at large. *See e.g., Wilkinson*, 832 F.2d at 1337-38, 1340 (holding mass suspicionless pat-downs searches unconstitutional despite reliable evidence that violence at rally was likely, but upholding magnetometer searches as reasonable and less intrusive); *Jensen v. City of Pontiac*, 317 N.W.2d 341, 347 (Mich. Ct. App. 1981) (recognizing that a "physical pat-down search by a

guard is more intrusive than a limited visual search"); *U.S. v. Cintro-Segarra*, 1993 WL 150307, at *3 (D. PR. 1993) (recognizing that "hand held magnetometer [ ] is much less intrusive [ ] than a pat-down or frisk"). Moreover, airport searches conducted with magnetometers and courtroom searches that generally employ a brief stop and visual examination of packages, are far less intrusive than the pat-down searches the TSA seeks to implement. *See Jacobsen v. City of Seattle*, 658 P.2d 653, 656-57 (Wash. 1983) (citing *Downing*, 454 F.2d at 1233; *Edwards*, 498 F.2d at 496); *see also Wilkinson*, 832 F.2d at 1339 (recognizing that "the airport and courtroom cases have sanctioned only magnetometer searches" despite unprecedented evidence of the potential harm to hundreds of persons posed by airplane hijackings and bombings).

Finally, relevant but not determinative to the constitutionality of the pat-downs is the TSA's failure to present convincing evidence that prohibiting the pat-down searches would preclude the TSA from averting the danger it seeks to prevent or that security measures already in place do not adequately protect the patrons. While the reasonableness of the search does not turn on an evaluation of the effectiveness of the search or the existence of less intrusive means, consideration of the evidence presented in this regard is one factor to consider in the Fourth Amendment analysis. *See Wilkinson*, 832 F.2d at 1340 n. 13 (recognizing that reasonableness of search does not invariably turn on existence of alternative, less intrusive means but finding that consideration of alternative means remains a legitimate factor in Fourth Amendment analysis).

While the TSA presented expert testimony that the pat-down searches are the most effective means of detecting IEDs, the TSA did not institute pat-down searches until two years after it received the only specific threat to the Stadium, a telephone call later determined to be a false alarm. The evidence suggests that the TSA decided to implement the policy in large part, if not exclusively, because of its perceived contractual obligation to do so. When the TSA finally voted to implement the pat-down procedure, it chose to apply the policy only to Buccaneers games. These circumstances undermine the TSA's argument that the pat-down searches are an essential aspect of terrorism protection. In conclusion, the TSA has not demonstrated that this case presents one of the very limited instances where the Plaintiff's privacy interest is "minimal" and the TSA's public safety interest "would be placed in jeopardy by a requirement of [individualized] suspicion." *See Chandler*, 520 U.S. at 314. Simply put, the intrusiveness of the pat-downs cannot be constitutionally justified under these circumstances.

Implied Consent

Defendants contend the pat-down search is constitutional because Plaintiff consented to the search by repeatedly attending NFL games knowing in advance that he would either be subjected to a pat-down search or denied entry to the Stadium. (Dkt. 8, p. 18). In other words, Defendants contend that Plaintiff was not compelled to submit to the pat-down search, but rather consented to the search by choosing to attend the Buccaneers games.

This type of implied consent, where the government conditions receipt of a benefit (attending the Stadium event) on the waiver of a constitutional right (the right to be free from suspicionless searches), has been deemed invalid as an unconstitutional condition. See Bourgeois, 387 F.3d at 1324 (rejecting city's argument that participants at a demonstration consented to search because they were not compelled to submit to search, but rather choose to participate in the protest) (citing Adams v. James, 784 F.2d 1077, 1080 (11th Cir. 1986)) ("[t]he doctrine of unconstitutional conditions prohibits terminating benefits, though not classified as entitlements, if the termination is based on motivations that other constitutional provisions proscribe").

Plaintiff's property interest in his season tickets and his right to attend the games and assemble with other Buccaneers fans constitute benefits or privileges that cannot be conditioned on relinquishment of his Fourth Amendment rights. See Bourgeois, 387 F.3d at 1324 (citing Boykins v. Fairfield, 399 F.2d 11, 13 (5th Cir. 1968)); see also Nakamoto v. Fasi, 635 P.2d 946, 951-52 (Haw. 1981) (search of patron's personal effects as condition to entry of the City arena for a rock concert held unconstitutional; a citizen should not be "required to relinquish his constitutional right to be free from unreasonable searches and seizures, in order to be allowed to exercise a privilege for which, incidentally . . . he has paid for").

Regardless of the unconstitutional condition imposed on Plaintiff's admission to the Stadium, Plaintiff's conduct does not constitute implied consent because it was not voluntarily given, free from constraint. A"[v]alid consent legitimizes an

otherwise unconstitutional search." See Lenz v. Winburn, 51 F.3d 1540, 1548 (11th Cir. 1995). "Searches conducted by means of consent are valid so long as the consent is voluntary." United States v. Chrispin, 2006 WL 1457689, at *3 (11th Cir. May 26, 2006) (citations omitted). "In order for consent to a search to be deemed voluntary, it must be the product of an essentially free and unconstrained choice." Id. (citations omitted); see also Shapiro v. State of Florida, 390 So. 2d 344, 348 (Fla. 1980) ("consent must be free and unconstrained, and the question of voluntariness is a question of fact to be determined from the totality of the circumstances"). The following factors are relevant in determining the issue of implied consent: (1) whether the individual was aware that his conduct would subject him to a search (2) whether a vital interest supports the search; (3) the apparent authority of the officer to conduct the search; (4) whether the individual was advised of his right to refuse; and (5) whether refusal would result in a deprivation of a benefit or right. Iaccarino, 767 So. 2d at 476 (internal citations and quotations omitted).

The evidence at the preliminary injunction hearing establishes that Plaintiff was not notified of the pat-down policy prior to purchasing his 2005-06 season tickets. After the TSA adopted the pat-down policy, Plaintiff was informed that the Buccaneers would not refund the cost of his season tickets. Plaintiff was faced with the choice of either subjecting himself to the pat-down searches or losing the value of his tickets, parking pass, seat deposit and the opportunity to attend the Buccaneers games. Moreover, if he was refunded his ticket price and relinquished his tickets, he would have been placed

at the bottom of a long waiting list if he desired to purchase season tickets in the future.

It is undisputed that at each game he attended, Plaintiff clearly expressed his objection to submitting to the pat-down. Therefore, in view of the totality of the circumstances and the factors delineated in *Iaccarino*, this Court cannot conclude that Plaintiff's consent to the searches was voluntarily given, free of constraint. *See Iaccarino*, 767 So. 2d at 479 (finding no implied consent where the "failure to acquiesce in a search would result in a deprivation of a patron's right to attend the concert, if not their ticket cost as well").

The Equities

Defendants contend the state court erred in issuing the injunction because the equities weigh against a preliminary injunction and in favor of public safety. (Dkt. 8, p. 19). While there is unquestionably a compelling public interest in preventing terrorist attacks, the public likewise has a compelling interest in preserving the constitutional right to be free from unreasonable governmental intrusion. This principled and cherished Fourth Amendment right has long been recognized as fundamental to the maintenance of a free society. *See Camara v. Municipal Ct. of City and County of San Francisco*, 387 U.S. 523, 528 (1967).

Public policy does not and cannot justify mass suspicionless searches of those who choose to attend an NFL game at the Stadium. Utilizing mass suspicionless pat-downs simply goes too far. Moreover, enforcing the injunction leaves the TSA in the same posture it chose to maintain in the years before the pat-downs were implemented. The TSA

will continue to utilize the same effective security measures to protect its patrons as it did before the NFL directed the use of pat-down searches. Those same procedures have been and continue to be used for non-Buccaneer events at the Stadium. While this Court recognizes a compelling public interest in preventing terrorism, the TSA has not justified the intrusion on Plaintiff's fundamental Fourth Amendment rights it seeks to impose.

Conclusion

Particularly after September 11, 2001, Americans are justifiably more sensitive to the need to protect against acts of terrorism. Many Americans have become more tolerant of protective measures such as magnetometers, container searches and pat-downs, rationalizing that the inconvenience is worth the added protection. In fact, pat-downs may not bother the average Buccaneers fan. However, the constitutionality of mass suspicionless searches does not turn on popular opinion. A generalized fear of terrorism should not diminish the fundamental Fourth Amendment protections envisioned by our Founding Fathers. Our Constitution requires more.

> While the threat of terrorism is omnipresent, we cannot use it as the basis for restricting the scope of the Fourth Amendment's protections in any large gathering of people. In the absence of some reason to believe that international terrorists would target or infiltrate this protest, there is no basis for using September 11 as an excuse for searching the protestors. . .

> . We cannot simply suspend or restrict civil liberties until the War on Terror is over, because the War on Terror is unlikely ever to be truly over. September 11, 2001, already a day of immeasurable tragedy, cannot be the day liberty perished in this country.

Bourgeois, 387 F.3d at 1311-12.

Defendants have failed to demonstrate that the preliminary injunction was issued in error. Specifically, Plaintiff has met his burden of establishing entitlement to a preliminary injunction, including a substantial likelihood of success on the merits of his constitutional claim. The purpose of the injunction is to preserve the *status quo* until this Court can render a meaningful decision on the merits of Plaintiff's constitutional claims.[19] *See Callaway*, 489 F.2d at 572. Accordingly, it is

[19] This determination may change, however, should evidence demonstrating a "substantial and real" threat to the Stadium materialize. In that event, it would be incumbent upon the TSA to present that evidence to the Court immediately and move to dissolve the injunction.

ORDERED AND ADJUDGED:

1. Defendants' Motion to Vacate and Dissolve the Preliminary Injunction (Dkt. 7) is

DENIED.

2. TheTSA is enjoined from conducting mass, suspicionless pat-down searches of every person attending Buccaneers games at Raymond James Stadium.[20]

DONE AND ORDERED in chambers this 28th day of July, 2006.

/s/ James D. Whittemore

J-D. WHITTEMORE
United States District Judge

Copies to: Counsel of Record

[20] The $21,000 bond required by the state court's preliminary injunction order has not been challenged.

IN THE THIRTEENTH JUDICIAL CIRCUIT
IN AND FOR HILLSBOROUGH COUNTY,
FLORIDA
CIVIL DIVISION

GORDON JOHNSTON,
Plaintiff,

Vs

TAMPA SPORTS AUTHORITY and
HENRY G SAAVEDRA, in his official
Capacity as Executive Director of the
TAMPA SPORTS AUTHORITY,
Defendants.

Case No 05-09151

Division: E

ORDER GRANTING PLAINTIFF'S EMERGENCY MOTION FOR PRELIMINARYINJUNCTION

This matter came before the Court on Plaintiffs Emergency Motion for Preliminary Injunction on October 19 and 27, 2005, and for a hearing to determine the amount of the bond on November 1, 2005 The Court after considering the evidence, the arguments of counsel, and the written memoranda of the parties, makes the following findings of fact and conclusions of law:

Plaintiff Gordon Johnston, a Tampa Bay Buccaneers season ticket holder, moved this Court to enter a preliminary injunction preventing the Defendants from performing suspicionless pat-down searches upon all persons entering Raymond James

Stadium during National Football League games. The evidence reveals that the four factors warranting entry of a preliminary injunction are all shown here: 1) the likelihood of irreparable harm, 2) the lack of an adequate remedy at law, 3) the substantial likelihood of success on the merits, and 4) that the public interest is served by granting the injunction. *Charlotte County* v *Vetter* 863 So 2d 465, 468 - 69 (Fla 2d DCA 2004) (citing *Snibbe v. Napoleonic Soc of Am, Inc,* 682 So 2d 568, 570 (ria 2d DCA 1996)). These factors are discussed in more detail below

1. Irreparable Harm

First, irreparable harm to Plaintiff will occur if a preliminary injunction is not granted. Plaintiff alleges a violation of his constitutional right to be free from government-directed searches of his person at Raymond James Stadium ("RJS") RJS is a sports stadium where the National Football League ("NFL") team the Tampa Bay Buccaneers ("Bucs") play their home games RJS is operated by defendant Tampa Sports Authority ("TSA"), a governmental entity created pursuant to Florida law Plaintiff Johnston has been a season ticket holder with the Bucs for several years To become a season ticket holder, he had to pay a seat deposit that is being repaid in annual increments If Mr Johnston cancels his season tickets this year, he will forfeit a substantial portion of his seat deposit.

Mr Johnston renewed his tickets for the 2005 season the early spring of 2005 at a cost of $869.20 plus $250.00 for stadium parking When Mr. Johnston paid for his tickets, he received no notice that the TSA would conduct pat-down searches of patrons entering RJS On September 13, 2005, the

TSA, at the request of the Bucs and after the NF L issued a mandate, voted to require all persons attending Bucs games at RJS to submit to a pat-down search from the waist up. [1] Mr. Johnston must either permit this pat-down search or he will be denied entry to RJS to see the Bucs' games. Mr. Johnston will be irreparably harmed if rSA continues its policy of requiring these pat-down searches because (as explained later), he will be forced to undergo a search in violation of his Florida constitutional right to be free from unreasonable government directed searches. Injunctive relief is proper to protect persons from such searches and unwanted intentional touching. *See,* e g, *Bourgeois* v *Peters,* 387 F 3d 1303 (II th Cir 2004) (enjoining magnetometer searches); *Stroeber* v *Commission Veteran* '5 *Auditorium,* 45.3 F Supp 926 (S D Iowa 1977) (enjoining searches of arena patrons); *see also Wzlkinson* v. *Forst,* 832 I' 2d 1330, 1340 (2d eir 1987) (enjoining mass pat-down searches, even in light of history of weapons being brought to past rallies).

---

[1] The TSA does not require persons attending University of South Florida football games at RJS to submit to pat -down searches

2. No Adequate Remedy at Law

Second, Mr Johnston has no adequate remedy at law. Specifically, money damages cannot compensate Mr Johnston for a violation of his constitutional right to be free from the TSA required searches. *Cj State* v *iaccarino,* 767 So 2d 470 (Fla 2d DCA 2000) (ruling that state cannot force patrons to forego right to enjoy event if they do not consent to pat-down search) *See also Bourgeois,* 387 l' 3d 1.303; *Wilkinson, 832* F.2d 1330; and *Stroeber,* 453 F Supp 926 (all enjoining mass searches)

3 - Substantial Likelihood of Success on the Merits

Third, Mr Johnston has a substantial likelihood of success on the merits The Constitution prohibits governmental entities from conducting searches without any cause for individualized suspicion *See Sosa-Leon* v. *State, 848* So 2d 342, 343 (Fla 2d DCA 2003) (officer must have "articulatible suspicion" that person being searched was armed) *See also State* v *[a(Canno,* 767 So 2d 470 (Ha 2d *DCA 2000)* (rejecting pat-down searches at rock concert); *North Dakota* v *Seglen,* 700 N W 2d 702 (N D 2005) (finding unconstitutional a pat-down search of a hockey fan) The TSA argues that the Constitution is not implicated because the TSA is not acting as a governmental actor when conducting the searches The evidence and the law, however, show that the TSA performs the pat-down searches as a state actor The Tampa Sports Authority is a public agency, created by the state legislature in 1965 "'for the purpose of planning, developing,and maintaining a comprehensive complex of sports and recreation facilities for the use and enjoyment of the citizens of

Tampa and Hillsborough County,' as a public purpose" *State* v *Tampa Sports Authority,* 188 So.2d 795, 796 (Fla. 1966) Although the TSA hires a private security company to perform the searches, that company operates at the direction of the TSA, pursuant to TSA policy; the searches arc performed under the visual observation of uniformed police officers; and they are paid for with taxpayer dollars Although the TSA argues the searches are done for a private function and do not implicate law enforcement purposes, this argument is contradicted by the evidence The TSA's own witnesses established that individuals performing the pat-downs are trained to get the attention of law enforcement if any contraband is found, and that if anyone were found attempting to bring contraband into the stadium, they would be subject to arrest, not allowed to walk away freely.

Under such circumstances, the searches constitute state action for purposes of search- and-seizure analysis. *See Barton Protective Services, Inc* v *Faber,* 745 So. 2d 968, 973 (Fla 4th DCA 1999); *State* v *Iaccarino,* 767 So 2d 470 (Fla. 2d DCA 2000) (off~duty officers, hired by and for the benefit ofthe interests of a private concert promoter, are state actors) [2]

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[2]*See also Nakamoto* v *Fall,* 635 P2d 946 (Hawaii 1981)(scarches by private security guards hired by rock concert promoter at city owned auditorium violate constitution when conducted pursuant to city policy); *Jensen* v *City oj Pontiac,* 317 N W 2d 619 (Mich. App1982)(visual searches by unarmed stadium security guards at city owned NFL football stadium subjected to constitutional analysis); *Stroeber, CommllSion Veteran's Auditoflum,* 453 F Supp

Article I, Section 12 of the Florida Constitution affords the same protection against unreasonable searches and serzures that the Fourth Amendment, as construed by the U.S Supreme Court, provides *Thomas* v *State,* 761 So. 2d 1010, 1014 (Fla. 1999) Thc first test is whcthcr a rcasonablc cxpectation of privacy attaches to the stadium searches at issue here *(jState* v *ShapirO,* 390 So 2d 344 (Fla .. 1980) Courts uniformly protect one's interest in bodily privacy, even in crowded venues and mass gatherings *See,* e g, *Bourgeois* v *Peters,* 3871~ 3d at 1311 ("The text of the Fourth Amendment contains no exception for large gatherings of people "); *iaccanno,* 767 So. 2d 470 Even if Mr Johnston might be inadvertently jostled by other football fans whilc entering the gate, he still retains an expectation of privacy in not being forced to subj ect his person to unwanted intentional touching by state actors "Warrantless searches conducted by instruments of the state are per se unreasonable

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926, 931 (S D. Iowa 1 977)(holding warrantless and suspicionless scarchcs at a rock concert violatc Fourth Amendment: "Here, where the commissioners purported to act in a capacity made possible by virtue of state statutes and were acting to provide security for a public facility financed by public monies, the requisite 'state action' is present "); *Gaion! v Folmar, 460* F Supp 10 (M D. Ala 1978)(random, warrantless searches of patrons attending roek concerts at municipally owned civic center unconstitutional); *State v Carter,* 267 N W 2d 385 (Iowa 1978) (use of off duty police officers as security guards to conduct pat-down search of rock concert attendees constitutes state action)

unless the searches fall within one of a few specifically-established and well-delineated exceptions" *iaccanno,* 767 So 2d at 476 (citing *Katz* v *United States,* 389 US .347 (1967» The government bears the burden of proving that the exceptions exist *Cf Reynolds v Stale, 592* So.2d 1082 (Fla1992) The TSA has not met this burden.

As the first exception to the rule against unreasonable searches, the T SA asserts that special circumstances exist to justify pat-down searches of every person entering RJS for a Bucs football game. No special circumstances exist. The only evidence of a particularized threat to RJS was a call that the TSA received approximately two years ago that was investigatcd and determincd to bc a false alarm The TSA did not pass any pat-down requirements in response to this threat The only other testimony regarding a threat to NF L stadiums came from a press story reporting that downloads of two stadiums (neither of them RJS) were discovered on computers linked to possible terrorists, approximately two years ago The FBI Field Office in St Louis investigating that incident stated that what was found was not a threat or even a potential threat. Rather, that FBI Field Director stated that there was no need to change anything about attendance at NFL games. The only other evidence regarding threats to NFL stadiums is that terrorists would like to target NFL games because they are an "American icon".

The second exception that the T SA claims is the doctrine of implied consent "When the validity of a search rests on consent, the State has the burden of proving that the necessary consent was obtained and that it was freely and voluntarily given, a burden that is not satisfied by showing a mere

submission to a claim of lawful authority" *Iaccarino,* 767 So 2d at 476 (Fla 2d DCA 2000) (citing *Florida* v *Royer,* 460 US. 491 (1983) The requirements for implied consent are (I) "whether the defendant was aware that his conduct would subject him to a search," (2) whether a "vital interest" supports the search, (3) the apparent authority of the officer to conduct the search, (4) "whether the defendant was advised of his right to refuse," and (5) "whether refusal would result in a deprivation of a benefit or right" *Id* (citations omitted).

The TSA argues that that Mr Johnston impliedly consented to the searches as a result of e-mail notices, signs, and public address announcements at the stadium as a condition of attending an event at a public stadium. However, there was no announcement of the policy before season ticket holders purchased their tickets The Buccaneers told Mr Johnston that they would refuse to grant Johnston a refund of his season tickets when Johnston called to complain about the pat-down policy Mr Johnston testified that even if he would be offered a refund, he would have rejected it And even if Johnston would have received refunds for an individual season's worth of tickets, he would still lose the remainder of his seat deposit and would move to the back of the line of approximately 100,000 people waiting for season tickets in the future. Further, Mr Johnston is being forced to consent to the search upon pain of being barred from exercising his rights as a ticket-holder to enter the stadium and experience the games in person.

Mr. Johnston testified that he expressed his lack of consent to the stadium searchers, but was patted down anyway. A person cannot be required to consent to an unlawful search as a condition of

attending an event at a public venue. In *Iaccarino,* the Second District Court of Appeal ruled there was no implied consent when the "failure to acquiesce in a search would result in a deprivation of a patron's right to attend the concert, if not their ticket cost as well "*State v. Jaccarino,* 767 So 2d 470 (Fla. 2d DCA 2000); *see also Gaioni v Folmar,* 460 F Supp 10(MD Ala. 1978)

In short, the pat-down searches constitute suspicionless, warrantless searches performed by a state actor and are per se unconstitutional The TSA has not met its burden of showing that special circumstances justifY granting an exception to this rule Neither has it sho'Nn that Mr Johnston impliedly consented to the searches It is substantially likely that Mr Johnston will prevail in the merits of this lawsuit.

4. Public Interest. The public interest favors the granting of an injunction to protect against unconstitutional searches. The right of the public to be free from unreasonable searches is within the public interest. September 11 is a tragedy, but it does not mean that the Constitution needs to be torn up and thrown out the door *See State v Iaccarino,* 767 So 2d 470 (Fla 2d DCA 2(00) (finding pat-down searches unconstitutional when they would require patrons to forego right to enjoy event if they did not consent to search) *See also Bourgeois v Peters,* 387 FJd 1303, 1311-12 (1IthCir. 2004):

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The City's position would effectively eviscerate the Fourth Amendment. It is quite possible that both protestors and passersby would be safer if the City were permitted to engage in mass, warrantless, suspicionless searches Indeed, it is quite possible that our nation would be safer if police were

permitted to stop and search anyone they wanted, at any time, for no reason at all *q Terry* v *Ohio,* .392 US 1,88 S Ct. 1868,20 LEd.2d 889 (1968) (requiring that police demonstrate individualized suspicion that a suspect is armed before frisking him). Nevertheless, the Fourth Amendment embodies a value judgment by the Framers that prevents us from gradually trading ever-increasing amounts of freedom and privacy for additional security. It establishes searches based on evidence - rather than potentially effective, broad, prophylactic dragnets - as the constitutional norm We cannot simply suspend or restrict civil liberties until the War on Terror is over, because the War on Tenor is unlikely ever to be truly over September 11, 2001, already a day of immeasurable tragedy, cannot be the day liberty perished in this country

Accordingly, it is hereby ordered, adjudged, and decreed:

1. The Emergency Motion For Preliminary Injunction is hereby GRANTED.

2. TSA is hereby enjoined from engaging in mass, suspicionless pat-down searches of every person attending Bucs games at RJS, upon posting of the bond set forth below.

3. Mr Johnston shall post a bond in the amount of $21 ,000 in case this injunction is later determined to be wrongly entered This bond may be posted as cash or through a surety.

DONE and ORDERED in Chambers at Tampa, Hillsborough County, Florida this 2nd day of November, 2005

Copies to:
John D Goldsmith
Rebecca H Steele
Richard Zabak
ORIGINAL SIGNED
NOV- 2 2005
PERRY.A. LITTLE

Judge Peny A Little CIRCUIT JUDGE
Circuit Court Judge

Amendment IV. Search and Seizure

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Effective: October 19, 1996

United States Code Annotated
Title 42. The Public Health and Welfare
Chapter 21. Civil Rights
Subchapter I. Generally

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

§ 12. Searches and seizures

The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, and against the unreasonable interception of private communications by any means, shall not be violated. No warrant shall be issued except upon probable cause, supported by affidavit, particularly describing the place or places to be searched, the person or persons, thing or things to be seized, the communication to be intercepted, and the nature of evidence to be obtained. This right shall be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court. Articles or information obtained in violation of this right shall not be admissible in evidence if such articles or information would be inadmissible under decisions of the United States Supreme Court construing the 4th Amendment to the United States Constitution.

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(2)

Supreme Court, U.S.
FILED
DEC 19 2008
OFFICE OF THE CLERK

No. 08-667

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2008

GORDON JOHNSTON,

Petitioner,

v.

TAMPA SPORTS AUTHORITY, AND HENRY G. SAAVEDRA, IN HIS OFFICIAL CAPACITY AS EXECUTIVE DIRECTOR OF THE TAMPA SPORTS AUTHORITY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF RESPONDENTS IN OPPOSITION

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December 2008

COUNTERSTATEMENT OF THE QUESTION PRESENTED

Whether a ticketholder is entitled to a preliminary injunction to prevent a pat-down inspection by a private screener when he voluntarily chooses to attend a private sporting event with knowledge that the pat-down is a condition for admission.

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INTRODUCTION

Petitioner asserted a Fourth Amendment challenge to a security procedure required by the National Football League as a condition of admission to all NFL games.

With knowledge of the requirement, Petitioner elected to attend three Tampa Bay Buccaneers home games, each of which was available to him on television. On each occasion, Petitioner walked to the admission gate, waited in line, and presented himself for a security pat-down by a private screener. No state authority compelled his attendance. No police officer or government employee participated in or compelled him to submit to a pat-down. No deceitful tactics, no threats of criminal penalties, no coercion undermined his ability to make a reasoned and fully voluntary choice between (a) attending the game and being patted down, and (b) watching the game on television and avoiding the pat-down.

This case, which originated in the Florida state courts, came to the Eleventh Circuit on interlocutory review. The district court had confirmed a preliminary injunction, entered by a state court before removal, barring the security pat-downs on constitutional grounds. Based on the totality of the circumstances, the Court of Appeals found that Petitioner had made a voluntary choice in attending the games with knowledge of the pat-down requirement, determined that he had not established a likelihood of success on the merits, and reversed the district court's decision.

That result should come as no surprise; nor should it be the least bit controversial. Every day, similar consent-based security searches are conducted at airports, courthouses, government buildings, and entertainment venues around the country. Courts consistently recognize that such searches are consensual, even in circumstances where the search condition is imposed by the government and even where the condition may implicate a fundamental right, such as the right to interstate travel.

The same conclusion is even more compelling here. The challenged condition was imposed by a private party, not by the government. And Petitioner seeks not to exercise a constitutionally protected right, but merely to enjoy a football game.

STATEMENT

1. Respondent Tampa Sports Authority ("TSA") is a public agency charged with responsibility to plan, develop, and maintain sports and recreational facilities in the Tampa Bay area.[1] TSA operates Raymond James Stadium, home to the Tampa Bay Buccaneers, an NFL franchise.

The Buccaneers use the stadium pursuant to a Stadium Agreement that obligates TSA to "make proper rules and regulations for use of the Stadium with regard to all Stadium Events, provided, however, that the content of such rules and

---

[1] Respondent Henry G. Saavedra is a nominal party, named only in his official capacity as TSA's Executive Director.

regulations shall be reasonably consistent with the rules and regulations enacted for other NFL stadia ..." Pet. App. at A-5.

Since at least 2001, NFL games have been identified by the federal government and numerous security experts as especially attractive terrorist targets. The risk of terrorist attack at an NFL game is considered so substantial that the FAA has restricted airspace over all NFL games, including games at Raymond James Stadium, and Congress has ratified the restrictions. *See* Pub. L. No. 108-199, div. F, tit. V, § 521, 118 Stat. 3, 343 (2004); FAA Notice to Airmen, FDC 3/1862 (June 18, 2007); FAA, 14 C.F.R. § 91.137 (2008).

2. In the wake of 9/11, acting on the advice of law-enforcement officials and private security professionals, the NFL implemented enhanced security measures for all of its games. In 2005, following a series of suicide bombings against soft civilian targets, including deadly attacks in Madrid and London, the NFL Commissioner required that all persons entering NFL stadiums on game day be patted down as a condition of admission to the game.

The upper-body pat-downs, conducted by private security screeners, address the particularized risk of an "improvised explosive device" (*e.g.*, a suicide bomb) concealed on a person's torso. The pat-down is different in purpose from and significantly less invasive than an ordinary police-style frisk.

Even before the pat-downs were required, fans at Raymond James Stadium were subject to searches for ordinary contraband as a condition of entry to Buccaneers games. In September 2005, the same

private security personnel implemented the NFL-mandated pat-down procedure.

Prior to the 2005 regular season, the Buccaneers and TSA informed ticketholders that pat-downs would be added to the existing security procedures as a condition of entry to Buccaneers home games. Notice was provided directly to ticketholders as well as through press releases, the team's website, handbills distributed to cars entering the stadium parking lot, audio recordings played at regular intervals near the stadium gates, and signs posted at each stadium entrance. Pet. App. at A-7.

3. Tickets for Buccaneers games are licenses, revocable at will by the Buccaneers for any reason, subject to a refund. "The NFL and the Buccaneers explicitly retained the right to exclude [Petitioner] from the Stadium for any reason." *Id.* at A-18.

Petitioner knew, prior to attending each of the first two games of the 2005 regular season, that a pat-down was a condition of entry to the game. Petitioner also knew that he could avoid the pat-down by not attending the game. He nonetheless elected to attend those games, each time voluntarily presenting himself at the gate for a pat-down so that he could watch the game in person. *Id.* at A-6 to A-7.

After the second such home game, Petitioner filed suit in Florida state court on October 13, 2005, seeking to bar the pat-downs under the Florida constitutional counterpart to the Fourth Amendment. He attended (at least) a third game after filing suit and again elected to be patted down. *Id.* at A-7.

4. On November 2, 2005, a Florida state court issued a preliminary injunction barring pat-downs at

Buccaneers home games; that court concluded that the pat-downs violated the state constitution. TSA immediately appealed; the preliminary injunction was automatically stayed pursuant to Florida Rule of Appellate Procedure 9.310(b)(2). After the trial court denied his motion to vacate the automatic stay, Petitioner filed an emergency motion with the Florida Second District Court of Appeals, which vacated the automatic stay on November 4, 2005. *Id.* at A-8.

On November 3, 2005, Petitioner amended his complaint to add a claim under the Fourth Amendment to the United States Constitution and to seek damages pursuant to 42 U.S.C. § 1983. TSA then removed the action to the United States District Court for the Middle District of Florida on November 30, 2005, and promptly filed a motion for reconsideration of the preliminary injunction. The District Court denied that motion on July 28, 2006. TSA then filed an interlocutory appeal to the United States Court of Appeals for the Eleventh Circuit. *Id.* at A-8 to A-9.

5. On June 26, 2007, the Court of Appeals issued a *per curiam* opinion holding that the preliminary injunction had been entered in error. Petitioner filed a petition for rehearing *en banc* on July 17, 2007. On June 18, 2008, the original panel (Judges Birch, Fay, and Duffey, sitting by designation) reaffirmed its earlier opinion in a revised, 20-page opinion that addressed at length -- and soundly rejected -- all of the arguments raised by Petitioner in his petition. *Id.* at A-4.

Among other things, the appellate court recognized that the issue of consent "is a fact question determined by the totality of the circumstances. . . on

a case-by-case basis." *Id.* at A-12 (citations omitted). In a lengthy fact-based analysis, the Court determined that Petitioner had consented to the pat-down and that his consent was voluntary. *Id.* at A-12 to A-17.

> Considering the totality of the circumstances, the Court concludes that [Petitioner] voluntarily consented to pat-down searches each time he presented himself at a Stadium entrance to attend a game. The record is replete with evidence of the advance notice [Petitioner] was given of the searches including preseason notice, pregame notice, and notice at the search point itself. It was clear error for the District Court to find that Johnston did not voluntarily consent to the pat-down searches.

Id. at A-20. The Court also observed that:

> [Petitioner] had no ... constitutional right to enter the Stadium for a Buccaneers football game. None of [Petitioner's] other rights appear to be impeded by the pat-down searches -- not even a property right, as [Petitioner's] ticket granted only a privilege and did not guarantee him a seat. [Petitioner] simply had no right to be in the Stadium during an NFL football game, and the revocable license granted by his ticket made clear he could be excluded for any reason.

Id. at A-14 n.7, A-15 to A-16.

Finally, the Court emphasized that "[t]he pat-down policy in this case was developed and mandated by the NFL Commissioner and applied exclusively to NFL events. The NFL and the Buccaneers do not have a law enforcement function that could have been served by the pat-downs; the record reflects instead that the NFL crafted the policy solely to protect its patrons from harm." *Id.* at A-14 n.7, A-16 to A-17.

Accordingly, the appellate court held that Petitioner had not shown a substantial likelihood of success on the merits and it reversed the decision of the district court granting the preliminary injunction. *Id.* at A-20.

Petitioner's *second* petition for rehearing *en banc* was denied on August 18, 2008, without any judge of the Eleventh Circuit requesting a poll.

Petitioner moved for a stay of the mandate, which a single judge of the Eleventh Circuit initially granted. TSA immediately filed a motion for reconsideration; the original three-judge panel unanimously vacated the stay and ordered that the mandate issue forthwith. On September 25, 2008, the district court dissolved the preliminary injunction.

There have been no further substantive proceedings in the district court. And, of course, there is no final judgment.

REASONS WHY THE PETITION SHOULD BE DENIED

Petitioner does not contend that the Court of Appeals applied the wrong legal standard in holding that the District Court erred in granting the preliminary injunction. Nor is there any serious basis for suggesting that the decision below conflicts with the decision of any other court.

Correctly applying *Schneckloth v. Bustamonte,* 412 U.S. 218, 219 (1973), the Eleventh Circuit concluded that the totality of the circumstances "demonstrate the voluntariness of [Petitioner's] consent." Pet. App. at 16. That conclusion can hardly be challenged in light of (a) Petitioner's repeatedly electing to attend Buccaneers' games with prior knowledge that a pat-down was a condition of admission and (b) the absence of *any* evidence in the record suggesting governmental coercion or pressure.[2]

I. There Is No Conflict Warranting Review.

1. The principal basis for certiorari asserted by Petitioner is a purported *intra-Circuit* conflict between the decision below and *Bourgeois v. Peters,* 387 F.3d 1303 (11th Cir. 2004). That asserted conflict

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[2] The Court of Appeals also found that Petitioner had consented to the pat-downs under the implied consent analysis developed by the Florida state courts. Pet. App. at 17 (citing *State v. Iaccarino,* 767 So.2d 470 (Fla. Dist. Ct. App. 2000)). Relevant to that decision was the Court's finding that the pat-downs supported a "vital interest," in that they had been required "specifically to guard against mass casualties at NFL games from a potential terrorist attack." Pet. App. at A-17.

is illusory. The fact that Judge Birch was on *both* Eleventh Circuit panels -- and the absence of even a single vote for rehearing *en banc* -- so confirm.

Bourgeois involved mass, suspicionless searches by law enforcement personnel as a condition of participating in political demonstrations protected by the First Amendment. *Id.* at 1310. The decision below noted and took account of "the many material differences between the search policy instituted in *Bourgeois* and the pat-down search at issue in this case." Pet. App. at A-14 to A-16 n.7. Those differences included (a) the fact that the searches in *Bourgeois* had been "enacted to serve the City's normal law enforcement function," and (b) the fact that unlike the political demonstrators, who had an undisputed right to assemble in the public place of the demonstration, "[Petitioner] had no right to be in the Stadium during an NFL game." *Id.* Accordingly, there is no intra-Circuit conflict.

And if there were such a conflict, it would be for the Eleventh Circuit -- not this Court -- to resolve in the first instance.

2. Nor is there any conflict between the opinion below and the holdings of *Blackburn v. Snow*, 771 F.2d 556 (1st Cir. 1985), and *Cochrane v. Quattrocchi*, 949 F.2d 11 (1st Cir. 1991). In those cases, the First Circuit carved out a special rule for strip and body cavity searches required of prison visitors as a condition of entry. Because it found that such searches "by [their] very nature, constitute[] an extreme intrusion upon personal privacy, as well as an offense to the dignity of the individual," the First Circuit held that "some as yet undefined 'level of individualized suspicion' is necessary before a strip

search of a prison visitor can be reconciled with the requirements of the Fourth Amendment." *Cochrane*, 949 F.2d at 13. In other words, the First Circuit held that in the special context of strip searches, the issue of consent may not even be reached in the absence of individualized suspicion. Accordingly, those cases present no conflict with the Eleventh Circuit's conclusion that consent was voluntary under the totality of the circumstances presented here.

There can be no comparison between the limited upper body pat-downs at issue here and the invasive strip searches addressed by the First Circuit. Numerous other important factors distinguish those cases from the case below, including the facts that (a) the pat-down requirement here was imposed not by the government but by a *private* party, the NFL, and (b) the "benefit" at issue here is a revocable privilege conferred by that private party, not something (*e.g.*, access to visit an incarcerated prisoner) over which the government has control. The Court of Appeals correctly recognized these fundamental distinctions: "Because the condition was imposed by a private party, [Petitioner] was not forced by the *government* to choose between assertion of his constitutional rights and obtaining a [government] benefit to which he was entitled." Pet. App. at 19 (emphasis added).

In any event, the First Circuit has since confirmed that the purported "unconstitutional conditions" doctrine, on which its strip search cases relied, does not apply "[i]n the absence of any showing that state action prompted the imposition of the alleged" condition. *United States v. Woodrum*, 202 F.3d 1, 10 (1st Cir.), *cert. denied*, 531 U.S. 1035,

121 S. Ct. 622 (2000). The evidence here is undisputed that the NFL prompted the imposition of the pat-down requirement. *Id.* at A-5, A-6.

3. Petitioner also asserts a conflict between the Eleventh Circuit's holding and a single decision of an *intermediate* appellate court in Florida. *State v. Iaccarino,* 767 So. 2d 470 (Fla. Dist. Ct. App. 2000). But the Eleventh Circuit expressly *applied* the test for implied consent recited in *Iaccarino.* Pet. App. at A-13, A-17. Moreover, the purported conflict with *Iaccarino* turns on Petitioner's assertion that he was not offered a refund for his ticket. That assertion, which is inapposite given his testimony that he would not have accepted a refund (*id.* at A-7), is hardly a reasonable predicate for asserting a conflict justifying this Court's review. That is especially so given that there is neither a final judgment in this case, which was before the Eleventh Circuit on interlocutory review, nor a ruling of Florida's highest court on the issue presented.

4. Nor is there a conflict presented by the decisions of the state high courts on which Petitioner relies. The claim in *Nakamoto v. Fasi,* 635 P.2d 946, 949 (Haw. 1981), arose in the context of "a City policy requiring rock concert promoters at [a city owned facility] to conduct" searches of their patrons; here, a private entity required the pat-downs. *State v. Carter,* 267 N.W.2d 385 (Iowa 1978) and *State v. Selgen,* 700 N.W.2d 702 (N.D. 2005), both involved fact-specific inquiries into whether there had been voluntary consent to searches conducted by

uniformed police officers.[3] Here, an equally fact-specific inquiry -- citing Petitioner's actual advance knowledge of the pat-down requirement, his election to choose to attend Buccaneers games, the absence of any evidence of coercion, and the fact that Petitioner was not in custody at the time of searches and did not believe that the searches would disclose incriminating evidence -- led the Court of Appeals to the opposite conclusion. Pet. App. at A-16 to A-17. These cases do not present a conflict, much less one warranting certiorari.

II. The Decision Below Is Fully Consistent With This Court's Established Precedents.

The decision below would be in full accord with this Court's precedents even if one assumed (a) that the state had imposed the pat-down requirement and (b) that the "right" to attend professional football games is subject to constitutional protection.

Thus, for example, in *Wyman v. James*, 400 U.S. 309, 324 (1971), the Court held that a state may reasonably condition participation in a welfare assistance program on consent to a home search, even if the plaintiff's refusal to consent would result in the loss of benefits. Under such circumstances,

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[3] Each court raised questions about whether the defendant was aware of -- and whether the state even provided effective notice of -- the search policy. *State* v. *Carter*, 267 N.W.2d 385, 387 (Iowa 1978); *State v. Selgen*, 700 N.W.2d 702, 709 (N.D. 2005). In *Selgen*, for example, there was no evidence that the defendant knew he had a choice to "consent to the search or leave." *Id.* at 711 (Maring, J., concurring). The facts here are fundamentally different.

"[t]he choice is entirely hers, and nothing of constitutional magnitude is involved." *Id.*

The Courts of Appeals have applied similar reasoning to consent-based government searches, finding consent to be valid so long as the individual had a clear choice. *See, e.g., Gilmore v. Gonzales,* 435 F.3d 1125, 1139 (9th Cir. 2006) (concluding that an airline passenger "had a meaningful choice" to submit to a search or to leave the airport); *United States v. Sihler,* 562 F.2d 349, 351 (5th Cir. 1977) (concluding that a prison guard had impliedly consented to search by voluntarily accepting and continuing employment); *McMorris v. Alioto,* 567 F.2d 897, 900-01 (9th Cir. 1978) (concluding that an attorney had voluntarily consented to a search even though he might otherwise have "to forego the practice of law.").

Just as the airline passenger, traveling on a private carrier that departs from a public facility, made a voluntary choice when he reached the security gate at the airport concourse, so too did Petitioner, eager to attend a private sporting event hosted at a public facility, make a voluntary choice when he reached the gates of the stadium. Both had knowledge of the security requirement; both had alternatives (*i.e.*, traveling by bus or car, watching the game on television). The only differences relevant to the issue of consent are (a) that only the airline passenger sought to engage in a constitutionally-protected right, and (b) that only the airport security procedures were required by and implemented by the government.

If an airline passenger is deemed to have given his voluntary consent when he elects to

present his boarding pass at the concourse gate, so too must Petitioner be deemed to have given his voluntary consent when he presented his revocable ticket at the stadium gate.[4]

CONCLUSION

For the foregoing reasons, the petition should be denied.

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[4] Nothing in the Eleventh Circuit's opinion stands for the proposition that Petitioner's "past consent" to the pat-downs "waives his right to seek injunctive relief to prevent an *unconstitutional* future search." Pet. App. at 3 (emphasis added). The Court of Appeals' interlocutory decision simply holds that Petitioner is unlikely to prevail on the merits of his claim in the absence of a showing that he was compelled by state action to attend a game, that he was compelled by a police officer to submit to a pat-down, or that governmental coercion undermined his otherwise voluntary choice to attend a private entertainment event with actual knowledge of the pat-down requirement.

Petitioner failed to make such a showing below. If he fails to make such a showing in some future challenge, the same result should obtain, not because of a "waiver" but rather because pat-downs in such circumstances are not unconstitutional.